89- 1419

No.

Supreme Court, U.S.
FILED
MAR 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HALIFAX HOSPITAL MEDICAL CENTER,
Petitioner,

v.

RICHARD A. BOLT, and
RICHARD A. BOLT, M.D., P.A.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

DAVID A. DONOHOE, P.C.*
CLINTON R. BATTERTON
AKIN, GUMP, STRAUSS, HAUER
& FELD
Suite 400
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036-1511
(202) 887-4000

HAROLD C. HUBKA
BLACK, CROTTY, SIMS, HUBKA,
BURNETT, BARTLETT & SAMUELS
501 N. Grandview Avenue
Daytona Beach, Florida 32118
(904) 274-4480

Attorneys for Petitioner
Halifax Hospital Medical Center

* Counsel of Record

March 9, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

1. Whether the "state action" doctrine protects a public hospital against Sherman Act claims where the hospital denies staff privileges to a physician, as contemplated by state law, but is accused of having done so in bad faith or pursuant to a conspiracy, as three circuit courts would apparently rule, or offers no such protection, as the court below and three other circuit courts would rule.

2. Whether, in the context of state-mandated peer review, a hospital can be considered as separate from its own medical staff, for purposes of antitrust conspiracy analysis.

LIST OF PARTIES

The parties before the Court of Appeals included Richard A. Bolt; Richard A. Bolt, M.D., P.A.; Halifax Hospital Medical Center; Humana, Inc.; Daytona Beach Community Hospital; Memorial Hospital of Ormond Beach; Willis Stose; Shederick W. Roberson; Alvin E. Smith; Richard Boye; Ralph Marino; and the Volusia County Medical Society.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING REVIEW	5
I. THERE IS A CLEAR CONFLICT BETWEEN THE JUDICIAL CIRCUITS, MANIFESTED BY THIS DECISION, AS TO WHETHER A PUBLIC INSTITUTION'S STATE ACTION IMMUNITY MAY BE ELIMINATED BY AN ASSERTION THAT IT "CONSPIRED" WITH OTHERS	5
A. Introduction	5
B. The Decision Below	6
C. The "Conspiracy Exception" Circuits	8
D. The "No Conspiracy Exception" Circuits	10
E. The Importance of the Issue	13
II. THE CIRCUIT COURT MADE EVERY HOSPITAL VULNERABLE TO SUIT UNDER THE SHERMAN ACT FOR EVERY PEER REVIEW DECISION ADVERSE TO THE APPLICANT, BY TREATING THE HOSPITAL AND ITS OWN STAFF AS SEPARATE ENTITIES CAPABLE OF ACTIONABLE CONSPIRACY	14

TABLE OF CONTENTS—Continued

	Page
A. Introduction	14
B. The Law of "Intra-Enterprise" Conspiracy	15
C. The Error in the Eleventh Circuit's Analysis	16
D. The Importance of the Issue	19
CONCLUSION	19
APPENDIX:	
Opinion of the Court of Appeals	1a
Opinion of the District Court	36a
Judgment of the Court of Appeals	53a

TABLE OF AUTHORITIES

Cases: Page

American Key Corp. v. Cole Nat'l Corp., 762 F.2d 1569 (11th Cir. 1985) 11
Bolt v. Halifax Hosp. Medical Center, 851 F.2d 1273 (11th Cir. 1988), *vacated*, 874 F.2d 755 (11th Cir. 1989) (en banc) 17
Boone v. Redevelopment Agency of San Jose, 841 F.2d 886 (9th Cir.), *cert. denied*, 109 S.Ct. 489 (1988) 11, 12
California Motor Transp. v. Trucking Unlimited, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972) 9
City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978) 7, 10
Community Communications Co. v. City of Boulder, 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982) 7
Commuter Transp. Sys., Inc. v. Hillsborough County Aviation Auth., 801 F.2d 1286 (11th Cir. 1986) 9
Consolidated Television Cable Serv., Inc. v. City of Frankfort, 857 F.2d 354 (6th Cir. 1988), *cert. denied*, 109 S.Ct. 1537 (1989) 12
Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984) .. 15, 16, 19
Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) 9
Greenville Publishing Co. v. Daily Reflector, Inc., 496 F.2d 391 (4th Cir. 1974) 18
Hancock Indus. v. Schaeffer, 811 F.2d 225 (3d Cir. 1987) 12, 13
Independent Taxicab Drivers' Employees v. Greater Houston Transp. Co., 760 F.2d 607 (5th Cir.), *cert. denied*, 474 U.S. 903 (1985) 9
Llewellyn v. Crothers, 765 F.2d 769 (9th Cir. 1985) 10, 11, 12
Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984) 15

TABLE OF AUTHORITIES—Continued

Page

Nanavati v. Burdette Tomlin Mem. Hosp., 857 F.2d 96 (3d Cir. 1988), *cert. denied*, 109 S.Ct. 1528 (1989) 18

Oltz v. St. Peter's Community Hosp., 861 F.2d 1440 (9th Cir. 1988) 16, 17, 18

Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc., 891 F.2d 1127 (4th Cir. 1989) 8, 9, 12

Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943) 6

Patrick v. Burget, 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988) 7

Town of Hallie v. City of Eau Claire, 471 U.S. 34, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985) 13

Weiss v. York Hosp., 745 F.2d 786 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985) 14, 16, 17, 18

Westborough Mall, Inc. v. City of Cape Girardeau, 693 F.2d 733 (8th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983) 9

Whitworth v. Perkins, 559 F.2d 378 (5th Cir. 1977), *vacated*, 435 U.S. 992, *reinstated on rehearing*, 576 F.2d 696 (5th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979) 9

Statutes and Rules:

Sherman Act, § 1, 15 U.S.C. § 1 (1988) 2

42 U.S.C. § 1983 (1982) 11

Fla. Const., art. IV, § 7 ..... 3, 6

Fla. Stat. § 395.065(1)-(2) (1979) 3, 6, 16

Fla. Stat. § 395.0653(2) (1979) 3, 6, 16

Laws of Fla., ch. 79-577 (1979) 2, 6

Fla. Admin. Code, § 10D-28.56 (1979) 4, 6, 16

Fed. R. App. P. 28(a)(4) 11

Treatises:

Areeda & Hovenkamp, *Antitrust Law* ¶ 212.1f (Supp. 1989) 6

Articles:

P. Areeda, *Antitrust Immunity for "State Action" after Lafayette*, 95 Harv. L. Rev. 435 (1981) 10

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Halifax Hospital Medical Center petitions for a writ of certiorari to review judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix, *infra*) is reported at 891 F.2d 810 (11th Cir. 1990).

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Sherman Act, § 1, 15 U.S.C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

Laws of Florida, Ch. 79-577 (1979):

> Section 1: A special tax district is hereby created to be known as "Halifax Hospital Medical Center" in Volusia County, Florida. . . .
>
> Section 2: (1) The governing body of the Halifax Hospital Medical Center shall be a board of Commissioners which shall consist of seven members, each of whom shall be residents of the district and appointed by the Governor. . . .
>
> (2) The Governor may suspend a commissioner pursuant to section 7, Article IV of the State Constitution. . . .
>
> Section 3: The district shall have all the powers of a body corporate, including the power . . . to appoint and employ an executive director or administrator, chief surgeon, and such other agents and employees as may be advisable. . .
>
> Section 5: The district may establish, construct, operate, and maintain such hospitals, medical facilities, clinics, out-patient facilities and services as are necessary. The hospitals, medical facilities or clinics, and out-patient facilities and services shall be established, constructed, operated and maintained by the district for the preservation of the public health, for the public good and for the use of the public of the district; and maintenance of such hospitals, medical facilities, clinics, and out-patient facilities and services in the district are hereby found and declared to be a public purpose and necessary for the general welfare of the residents of the district.

Section 6. The district shall have the power of eminent domain. . .

Section 9. (1) Prior to the issuance of full faith and credit bonds, the Board of Commissioners shall determine the amount which, in the opinion of the board, will be necessary to be raised annually by taxation for the payment of the debt service on all such outstanding and all such bonds proposed to be issued. . . .

Fla. Const., art. IV, § 7:

(a) By executive order stating the grounds and filed with the secretary of state, the governor may suspend from office any state officer not subject to impeachment . . . for malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform his official duties, or commission of a felony, and may fill the office by appointment for the period of suspension.

Section 395.065(1)-(2), Florida Statutes (1979):

395.065 Hospital disciplinary powers—

(1) The medical staff of any hospital licensed pursuant to this chapter is authorized to suspend, deny, revoke, or curtail the staff privileges of any staff member for good cause . . . . However, the procedures for such actions shall comply with the standards outlined by the Joint Commission of Accreditation of Hospitals and the Principles of Participation in the Federal Health Insurance Program for the Aged.

(2) There shall be no liability on the part of, and no cause of action shall arise against, any hospital, hospital medical staff, or disciplinary body or its agents or employees for any action taken in good faith and without malice in carrying out the provisions of this section.

Section 395.0653(2), Florida Statutes (1979):

(2) Nothing herein shall restrict in any way the authority of the medical staff of the hospital to review

> for approval or disapproval all applications for appointment and annual reappointment to all categories of staff and make recommendations on each to the governing authority, including delineation of privileges to be granted in each case. . . .

Section 10D—28.56, Florida Administrative Code (1979):

> Governing Authority. The hospital organization shall have an effective governing authority responsible for the legal and moral conduct of the hospital as a functioning institution.
>
> (1) The governing authority in fulfilling its responsibility shall be organized under approved written bylaws, rules and regulations which shall:
>
> * * * *
>
> (f) Provide for the appointment, reappointment, or dismissal of members of the medical staff and a procedure for hearing and appeal. No action on appointment, reappointment or dismisal shall be taken without prior referral to the medical staff for their recommendation, provided that the governing authority may suspend a medical staff member pending final determination of any reappointment or dismissal. The governing body shall only appoint members of the medical staff as recommended by the medical staff.

STATEMENT OF THE CASE

In this case, a surgeon challenges the refusal of a public hospital and two private hospitals in the Daytona Beach, Florida, area to grant his applications for permanent staff privileges. The three hospitals conducted extensive administrative proceedings with respect to his qualifications, and ultimately his applications were denied. The physician contends that the hospitals, the local medical society and five physicians who served as medical staff officers in the administrative "peer review" proceedings concerning his applications "conspired"

against him in violation of § 1 of the Sherman Act. In a trial held in 1984, the district court directed a verdict for the defendants on the grounds that the plaintiffs had elicited no evidence which could be construed to show that any of the defendants had any economic motive to "conspire" against him.

The Eleventh Circuit reversed. The circuit court found that Halifax Hospital Medical Center ("Halifax"), is a public hospital administered by a board appointed by the Governor of Florida, and that the Florida legislature must have foreseen that Halifax's express power to select appropriate medical staff meant that Halifax would engage in anticompetitive conduct, *i.e.*, denying the applications of some physicians. Nonetheless, the circuit court held that Halifax enjoys no "state action" immunity from the antitrust laws because the plaintiff here has accused the hospital of "conspiring" with its own medical staff and two other hospitals. The lower court also held that a hospital which is carrying out a state-mandated peer-review privileging process is legally capable of conspiring with the members of its own staff who are required by law to participate in this process.

REASONS FOR GRANTING REVIEW

I. THERE IS A CLEAR CONFLICT BETWEEN THE JUDICIAL CIRCUITS, MANIFESTED BY THIS DECISION, AS TO WHETHER A PUBLIC INSTITUTION'S STATE ACTION IMMUNITY MAY BE ELIMINATED BY AN ASSERTION THAT IT "CONSPIRED" WITH OTHERS.

A. Introduction

The circuit court's decision, which echoes those of several other judicial circuits, has the effect of substantially weakening, if not destroying, the "state action" doctrine, which insulates state subdivisions against federal antitrust liability. The lower court held that where a state subdivision engages in conduct having anti-competitive

effects, and that conduct was contemplated by the state legislature, the subdivision is nonetheless subject to federal antitrust liability if its officers had improper motives, in this case, "conspiratorial" motives.

This is a view of the state action doctrine which has also been adopted by the Fourth, Fifth and Eighth Circuits. At the same time, it has been squarely rejected by the Third, Sixth and Ninth Circuits. The latter circuit courts hold that the state action doctrine cannot be subverted by a bare claim that a subdivision's actions were unauthorized by state law in the sense that its officers allegedly harbored improper motives, even if their actions were otherwise contemplated by the state legislature.[1]

B. The Decision Below

The state action doctrine is grounded in fundamental concepts of federalism and state sovereignty. Areeda & Hovenkamp, *Antitrust Law* ¶ 212.1f (Supp. 1989), and is of enormous significance to public institutions. If every legislatively-contemplated public action having the effect of displacing competition can be subjected to the antitrust laws by an assertion that the "real" motives of the decision-makers were conspiratorial, then the state action doctrine is a thing of the past. At present, in light of the squarely contradictory positions which have been taken on this issue, it is virtually impossible for public institutions, such as Halifax, to govern their conduct so as to conform to the law.

The state action doctrine, first recognized by this Court in *Parker v. Brown*, 317 U.S. 341 (1943), pro-

[1] Halifax's statutory authority is set forth above in the quoted language of the act establishing Halifax as a state taxing district public hospital, Fla. Stat. Ch. 79-577 (1979), Fla. Const., art. IV, § 7; and in those of general application to the medical staff credentialing process mandated for all Florida hospitals. Fla. Stat. §§ 395.065(1)-(2) (1979), 395.0653(2) (1979); Fla. Admin. Code § 10D-28.56 (1979).

vides that the actions of a state, even if anticompetitive, are beyond the reach of the federal antitrust laws. In subsequent decisions, this Court made it clear that the doctrine applies to the actions of state subdivisions—*e.g.*, municipalities and counties—so long as those actions were either directed by or contemplated by the state legislature. *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

The circuit court's decision, like those of several other judicial circuits, threatens the virtual elimination of the state action doctrine, as it applies to state subdivisions, by holding that Halifax, which the lower court held to be the equivalent of a municipality,[2] Appendix at 23a-28a, was *not* entitled to assert the defense to the first charge—that it had conspired with its own medical staff. This determination was made after the lower court had first determined that "the Florida legislature clearly articulated a policy to displace competition, at least to the extent that a [Halifax] decision not to hire a physician can be considered a boycott." *Id.* The lower court added that "the Florida legislature must have foreseen that [Halifax] would engage in anti-competitive conduct based on recommendations of the physician's peers . . . ." *Id.*[3] The only basis offered for denying Halifax the benefits of the state action doctrine was the plaintiff's claim that Halifax "not only relied on the peer review committee's recommendations but *conspired* with

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[2] We should emphasize, from the outset, that it was undisputed that Halifax's actions were either those of the state itself or else those of a state subdivision, Appendix at 23a-28a. Consequently, there was no need to show active state supervision of Halifax's actions, as was the case in *Patrick v. Burget*, 486 U.S. 94 (1988), a case dealing with *private* parties seeking to invoke the state action doctrine.

[3] In view of the specific statutes authorizing and directing Halifax to carry out the staff credentialing process, see pages 2-4 above, any contrary conclusion would have been untenable.

that committee to deny his privileges on pretextual grounds." *Id.* (emphasis in original).

The other conspiracy alleged against Halifax was that, in carrying out its statutory duty to review Dr. Bolt's privilege application, Halifax had combined with two private hospitals and their medical staffs to deny the application. As with the first conspiracy charge, the circuit court held that the allegation that Halifax's stated reasons for denying the application were "pretextual" or "baseless" and "part of a scheme to achieve a common illicit end" was sufficient to subject Halifax to antitrust liability. Appendix at 33a.

The Eleventh Circuit's grafting of this "conspiracy" exception onto the state action doctrine, if adopted, would sound the death knell for that doctrine. No longer would a public entity be entitled to a state action defense upon a showing that: (1) it is a state subdivision; and (2) its conduct was contemplated by the legislature. Under the lower court's view, the public entity would forfeit its state action defense if the plaintiff accused it of taking that action for improper or conspiratorial motives. Were this an isolated decision, its implications might be minimized, but there can be no doubt that it represents a clear trend in several circuits to erode the state action doctrine by injecting a "bad motives" exception, a trend which is simultaneously being countered by diametrically opposed decisions in other circuits.

C. The "Conspiracy Exception" Circuits

Less than a month before the Court of Appeals decision here, the Fourth Circuit adopted precisely the same view in *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, 891 F.2d 1127 (4th Cir. 1989). There, a city was held liable for utilizing its billboard regulatory authority in such a way as to favor one billboard company at the expense of another. This determination was based on the jury's finding that "the city was not acting pursuant to the direction or purposes of

the South Caorlina statutes but conspired solely to further [the favored billboard company's] commercial purposes to the detriment of competition in the billboard industry." *Id.* at 1133. The Fourth Circuit's "conspiratorial motives" test was confirmed in the following passage:

> Clearly this would not preclude permissible and even desirable private meetings by concerned private persons with legislators and public administrators. See *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 137-41 (1961); *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972). What is not permissible in the *Parker* immunity context, however, is that such private contacts and agreements related not to the purpose of attaining governmental action but solely to forcing competitors from a particular market.

891 F.2d at 1134.

Although the cases cited by the Eleventh Circuit as support for the "conspiracy" exception, *Commuter Transportation Systems v. Hillsborough County Aviation Authority*, 801 F.2d 1286 (11th Cir. 1986), and *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.*, 760 F.2d 607 (5th Cir), *cert. denied*, 474 U.S. 903 (1985), do so only in *dicta*, other circuits are clearly following the path of the Eleventh and Fourth Circuits. See *Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983), and *Whitworth v. Perkins*, 559 F.2d 378 (5th Cir. 1977), *vacated*, 435 U.S. 992, *reinstated on rehearing*, 576 F.2d 696 (5th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), both holding that a municipality exercising its zoning powers in conspiracy with private parties is not entitled to the state action defense.

This dangerous trend, threatening the very existence of the state action doctrine, was identified by Professor

Areeda in the wake of this Court's decision in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). P. Areeda, *Antitrust Immunity for "State Action' after Lafayette*, 95 Harv. L. Rev. 435, 450-455 (1981). He noted that:

> Because no official or agency is authorized to conspire in restraint of trade, that charge has become a popular vehicle for challenging antitrust immunity.

Id. at 451. Professor Areeda went on to express his view that such allegations "deserve very little respect from the the antitrust courts," *id.* at 452, because of: (1) the temptation for any losing party to attribute a disappointing decision to some conspiracy; (2) the modest likelihood that had faith can be proved; and (3) the "potential chilling effect" this might have on the governmental entity's operations. *Id.*

D. The "No Conspiracy Exception" Circuits

The Ninth Circuit, mindful of these dangers, has refused to weaken the state action doctrine by introducing a "conspiracy" exception. For example, in the most-cited decision on the issue, *Llewellyn v. Crothers*, 765 F.2d 769 (9th Cir. 1985), a group of chiropractors complained that a state official, who was lawfully empowered to regulate fees, had established an improper fee schedule, because he and an insurance company disliked chiropractors as a group and were actively seeking ways to "get" chiropractors. *Id.* at 774. The Ninth Circuit refused to examine the subjective motivations of the individual actors. Rather, it limited its inquiry to whether the challenged actions satisfied the objective standards set forth in *Parker*. *Id.* As long as the state actor did not exceed his authority and as long as his actions were taken pursuant to an express state policy and were of a kind contemplated by the statutory scheme, the Ninth Circuit held that it could not investigate the *motivations* behind those valid actions. *Id.* The court reasoned that:

> [a] contrary conclusion would compel the federal courts to intrude upon internal state affairs whenever a plaintiff could present colorable allegations of bad faith on the part of defendants.

Id.

The court in *Llewellyn* also observed that permitting disappointed persons to challenge the subjective motives of state actors "would tempt aggrieved parties to forego available state corrective processes in hopes of obtaining the treble damage remedy conferred by the Sherman Act." *Id.* That is exactly what happened here. Dr. Bolt did not exhaust his administrative remedies, but filed this action instead of presenting any defense evidence in the administrative evidentiary hearing, and before the Board of Commissioners reviewed the staff recommendation or the administrative record. Appendix at 40a, 48a-51a.[4] *Llewellyn's* concern about collateral attacks on decisions made by public institutions, short-circuiting state review procedures and requiring the federal courts to second-guess the merits of the decisions of public officials, was well founded.

The Ninth Circuit followed this holding and reasoning in *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886 (9th Cir.), *cert. denied*, 109 S.Ct. 489 (1988), where developers complained that the city-established redevelopment corporation conspired with a rival developer to assure the rival developer a monopoly in office buildings. The court held that this argument was controlled

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[4] These findings of the district court below are undisturbed by the circuit court on appeal, because they were entered in connection with the granting of Halifax's motion for summary judgment dismissing Dr. Holt's civil rights claim, filed under 42 U.S.C. § 1983, and alleging a denial of procedural and substantive due process. By failing to appeal the dismissal of his civil rights claims, Dr. Bolt waived that issue and the underlying findings. American Key Corp. v. Cole National Corp., 762 F.2d 1569, 1579 n.9 (11th Cir. 1985); Fed. R. App. P. 28(a)(4).

by its prior ruling in *Llewellyn*. 841 F.2d at 892. The court determined that the redevelopment agency's actions were clearly and affirmatively authorized by the state legislature and that the state law intended to replace competition. *Id.* at 890. Given those findings, the court held that the antitrust claims against the city and agency were properly dismissed. *Id.* at 892.

The Fourth Circuit's opinion in *Omni* correctly acknowledged, by its use of a "but see" citation, that the Ninth Circuit has refused to adopt the "conspiracy" exception. 891 F.2d at 1134. So also has the Sixth Circuit, relying on *Llewellyn* and *Boone* in *Consolidated Television Cable Service, Inc. v. City of Frankfort*, 857 F.2d 354, 361-362 (6th Cir. 1988) (". . . the sovereignty of state action must be respected without reference to the subjective motivation of persons implementing the state's policy. Any other analysis would unacceptably erode the state action doctrine, since plaintiff would only need to present a claim of bad faith to escape the doctrine"), *cert. denied*, 109 S.Ct. 1537 (1989) *Id.* at 362.

The Third Circuit followed the Ninth Circuit's lead in *Hancock Industries v. Schaeffer*, 811 F.2d 225, 234-36 (3d Cir. 1987). That case involved antitrust charges against a county solid waste authority operating a landfill that refused to accept waste from the plaintiffs, who were located outside the county. The excluded out-of-county waste hauler argued that the state action doctrine was inapplicable because the county decisionmakers "had ulterior motives when they adopted the exclusionary policy." *Id.* at 234. Thus, while not arguing for a "conspiracy exception," the plaintiffs did clearly assert a "bad faith exception." This argument was rejected by the court, quoting at length from the Ninth Circuit's holding in *Llewellyn* that claims of improper subjective motivations on the part of state actors cannot be allowed to strip them of their state action immunity. *Id.* at 235.

In reaching this conclusion, the Third Circuit placed special emphasis on this Court's determination in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46-47 (1985) that public bodies present only a "minimal risk" of improper conduct and that it would be undesirable to "embroil the federal courts in the unnecessary interpretation of state statutes." *Hancock*, 811 F.2d at 235, quoting from *Hallie*, 471 U.S. at 44 and 47.[5]

E. Importance of the Issue

The decision below is just the most recent in one line of cases approving the "conspiracy exception" to the state action doctrine, a line of cases squarely on a collision course with the decisions of the Third, Sixth and Ninth Circuits rejecting that exception. There is an urgent need to resolve this conflict, which has persisted for a number of years, so that the contours of the doctrine become clear and public bodies will have the guidance they require in order to shape their future conduct. We respectfully suggest that the only rational solution of the issue is to adopt the "no conspiracy exception" rule because a:

> contrary conclusion would compel the federal courts to intrude upon internal state affairs whenever a plaintiff could present colorable allegations of bad faith on the part of defendants.

Hancock, 811 F.2d at 234. In any event, the dispute must be resolved because both the viability of the state action doctrine and the manner in which public entities will be free to conduct their affairs hang in the balance.

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[5] Judge Stapleton in *Hancock* stated, ". . . we predict that the Supreme Court will ultimately hold that the subjective motivation of state and local decisionmakers need not be explored in this context." 811 F.2d at 234.

II. THE CIRCUIT COURT MADE EVERY HOSPITAL VULNERABLE TO SUIT UNDER THE SHERMAN ACT FOR EVERY PEER REVIEW DECISION ADVERSE TO THE APPLICANT, BY TREATING THE HOSPITAL AND ITS OWN STAFF AS SEPARATE ENTITIES AND THEREFORE CAPABLE OF ACTIONABLE "CONSPIRACY."

A. Introduction

In addition to the circuit court's adoption of a "conspiracy exception" to the state action doctrine, it also held that a hospital is legally capable of conspiring with its own medical staff in the peer view context. Appendix at 14a-15a. The lower court held that:

> a hospital and the member of its medical staff . . . are legally separate entities, and consequently no similar danger exists that what is in fact unilateral activity will be bootstrapped into a "conspiracy." In sum, then, we hold that a hospital and the members of its medical staff are all legally capable of conspiring with one another.

Id. (citation omitted).

The issue of whether a hospital is legally capable of conspiring with its own staff in the peer review process is critical to the very survival of that process and is the subject of sharp and direct conflict between the circuits. The Eleventh Circuit acknowledged this by citing and rejecting the Third Circuit's analysis in *Weiss v. York Hospital*, 745 F.2d 786 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985). The Third Circuit there held that in a peer review privileging context, a "hospital cannot legally conspire with its medical staff." 745 F.2d at 815. The Third Circuit went on to state that:

> Accordingly, we conclude that *the district court correctly charged the jury that there could not be a conspiracy between the hospital and the medical staff.*

745 F.2d at 817 (emphasis supplied).

B. The Law of "Intra-Enterprise Conspiracy"

The principal analysis of the capacity of affiliated or related actors to conspire with one another (frequently referred to as the "intra-enterprise" or "bathtub" conspiracy issue) is set forth in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). In that decision, this Court ruled that a corporation could not legally "conspire" with its own subsidiary, because the two corporations are one economic entity, not two independent competitors, for the purpose of analyzing their conduct.

In ariving at this conclusion, this Court analyzed in depth the concerns undergirding the Sherman Act's condemnation of collusive or conspiratorial actions and, in turn, the principles to be applied in determining whether two or more alleged conspirators have the characteristics likely to implicate those concerns. Thus, the Court began its analysis by noting the " 'basic distinction between concerted and independent action' ", 467 U.S. at 767, quoting from *Monsanto v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984). Concerted activity was said to be "judged more sternly than unilateral activity", 467 U.S. at 768, because it is "inherently . . . fraught with anticompetitive risk." *Id.* at 768-769. The Court focused on the proposition that an actionable conspiracy must involve "two or more entities that previously pursued their own interests separately . . . combining to act as one for their own benefit." *Id.* at 769.

To illustrate, the Court noted that coordinated actions by officers or employees of a single firm do not

> raise the antitrust dangers that § 1 was designed to police * * * [and] do not provide the plurality of actors imperative for a § 1 conspiracy."

Id. In the same vein, this Court noted that coordination between a corporation and its unincorporated division:

> does not represent a sudden joining of two independent sources of economic power previously pursuing

> separate interests [and therefore] it is not an activity that warrants § 1 scrutiny.

Id. at 771.

For similar reasons, a hospital and its own medical staff are one economic entity when they carry out their state-mandated obligation to review an individual physician's privilege application. In carrying out this obligation, the staff and the hospital have no choice as to whether they will act together.

The Third Circuit's decision in *Weiss*, applying the principles enunciated in *Copperweld*, held that a hospital cannot conspire with its own staff. In light of this Court's analysis and holding in *Copperweld*, the *Weiss* decision is clearly correct because there can be no actionable combination of separate and independent interests where those interests—the hospital and its staff—have no choice under state law as to whether they will act together.[6]

C. The Error in the Eleventh Circuit's Analysis

The decision below, however, rejected the *Weiss* analysis, holding that a hospital may be charged with conspiring with its own medical staff. Appendix at 14a-15a. In so holding, the Eleventh Circuit cited *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1450 (9th Cir. 1988), for the proposition that a hospital and its own staff are legally separate entities for conspiracy analysis. *Oltz*, in turn, relied on the earlier panel opinion in this

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[6] Under the process mandated by Florida law, the hospital medical staff reviews the application, makes a recommendation to the governing board, and holds a de novo evidentiary hearing if the applicant objects to the recommendation, and then the board makes the final decision. Fla. Stat. §§ 395.065(1), (2); 395.0653(2) (1979); Fla. Admin. Code § 10D-28.56 (1979). In this process, the hospital is certainly not in economic competition with its own medical staff, nor is it free to refuse to confer with them.

case. *Bolt v. Halifax Hosp. Medical Center*, 851 F.2d 1273, 1276-77 (11th Cir. 1988), *vacated*, 874 F.2d 755 (11th Cir. 1989) (en banc).[7] In *Oltz*, the Ninth Circuit accepted *Bolt*, which the Ninth Circuit correctly read as a rejection of the *Weiss* analysis.

Oltz, however, was not a staff privilege case at all. There, the officially-constituted hospital staff committee had recommended one course of action as to how nurse anesthetists should be credentialed at the hospital (on a basis favorable to the plaintiff) but the hospital nonetheless terminated him at the behest of the defendant anesthesiologists, who were not performing any official function whatsoever at the hospital. *Oltz* therefore did not address the issue posed in *Weiss* and in the lower court here as to the capacity of a hospital to conspire with others within its own organization. In fact, *Oltz* essentially acknowledged that the physician defendants were not acting in any official capacity:

> Unlike the staff in *Weiss*, the M.D. anesthesiologists [defendants] were not empowered to act for St. Peter's. The board of trustees held the power to terminate Oltz and award the exclusive contract. Therefore, the anesthesiologists were not acting like an officer in relation to the corporation, and St. Peter's had the capacity to conspire with them.

Id. at 1450.

This passage illustrates the critical issue and the manner in which the lower court erroneously resolved it. Obviously, the fact that a doctor is a hospital staff member does not render the hospital incapable of conspiring with the doctor under any circumstances. If, however, the staff member is functioning as an integral part of

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[7] As to the "intra-enterprise" conspiracy issue here addressed, the opinion below is substantially identical to the vacated panel opinion reported at 851 F.2d 1273.

the hospital's staff privilege structure, as was the case here and in *Weiss*, then there cannot be the requisite separateness between the hospital and the people through which it not only does function in the privileging process but is legally required to function. The lower court's reasoning that "[a] hospital and the members of its medical staff . . . are legally separate entities," Appendix at 14a-15a, thus does not answer the crucial question because, to illustrate, Acme Corporation and John Smith, its president, are in a very real sense "separate entities" *sometimes*. It is only when the president acts as president that he is incapable of conspiring with Acme. In the same vein, a staff doctor who owns a medical supply company could conspire with a hospital with respect to that company's activities. See *Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d 391 (4th Cir. 1974). When he functions as an essential part of the privileging process, however, state law compels him and the hospital to act together and thus fuses them into a single economic entity, for purposes of conspiracy analysis.

Putting *Oltz* to one side, then, because it simply stands for the unexceptionable proposition that a hospital *can sometimes* conspire with a doctor who happens to be a member of its staff, there is thus a clear and irreconcilable conflict between the Third Circuit's decision in *Weiss*[8] and the Eleventh Circuit's decision here. We respectfully submit that the rational rule must be that a hospital which is required by state law to make privileging decisions, *see* n.6, *supra*, and which must utilize its staff to make those decisions, *id.*, cannot be found to be legally separate from the staff involved in that process. There is no principled basis upon which to distinguish between a hospital's decision-making process, involving its own staff, and a corporation's decision-

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[8] Subsequently followed in *Nanavati v. Burdette Tomlin Memorial Hosp.*, 857 F.2d 96, 118 (3d Cir. 1988).

making process, involving its own employees. The change from "separate economic actors" to persons "combining to act as one," which *Copperweld* identifies as the essence of conspiracy, 467 U.S. at 769, cannot occur if, by command of state law, the actors are already combined.

D. The Importance of the Issue

The simplistic and erroneous view adopted by the Eleventh Circuit threatens the destruction of the peer review process, a process which is essential to the delivery of quality health care. Any physician whose qualifications are found wanting in that process can convert it into a conspiratorial activity by disaggregating the participants and treating them as "separate actors." This potential will inevitably act as a significant, if not fatal, deterrent to implementation of the peer review process. Such a result, stemming from a fundamental error in the application of conspiracy law, cannot be permitted. The Third Circuit's analysis in *Weiss* is legally correct and would avoid the severe consequences in the health care industry which would follow from the Eleventh Circuit's approach. There is an urgent need for this Court to resolve this conflict and to make it clear that hospital peer review can be implemented without the overhanging threat of antitrust litigation.

CONCLUSION

The circuit court's opinion, if allowed to stand, will sow further confusion as to the proper application of the state action immunity. The circuit court's opinion is a manifestation of a deep and important conflict among a number of circuits. Similarly, the circuit court's opinion that a hospital may be sued for "conspiring" with its own medical staff to deny a privilege application deepens another fundamental conflict among the circuits and places form over substance in applying the economic policy embodied in the Sherman Act. For these reasons,

petitioner Halifax Hospital Medical Center requests that the Court accept review and reverse the decision below.

Respectfully submitted,

DAVID A. DONOHOE, P.C.*
CLINTON R. BATTERTON
AKIN, GUMP, STRAUSS, HAUER & FELD
Suite 400
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036-1511
(202) 887-4000

HAROLD C. HUBKA
BLACK, CROTTY, SIMS, HUBKA, BURNETT, BARTLETT & SAMUELS
501 N. Grandview Avenue
Daytona Beach, Florida 32118
(904) 274-4480

Attorneys for Petitioner Halifax Hospital Medical Center

* Counsel of Record

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 84-3256, 84-3603

RICHARD A. BOLT AND RICHARD A. BOLT, M.D.,
Plaintiffs-Appellants,

v.

HALIFAX HOSPITAL MEDICAL CENTER, *et al.*,
Defendants-Appellees.

Appeals from the United States District Court
for the Middle District of Florida

Jan. 9, 1990

Donald E. Christopher, Orlando, Fla., Clark Havighurst, Duke University School of Law, Durham, N.C., Hal K. Litchford, Litchford, Christopher & Milbrath, P.C., Orlando, Fla., for plaintiffs-appellants.

Elizabeth R. Hilder, F.T.C., Washington, D.C., for amicus F.T.C.

William E. Loucks, Daytona Beach, Fla., for Volusia County Medical Soc.

James E. Slater, Kimberly Ashby, Orlando, Fla., for Willis Stose, M.D.

J. Charles Ingram, G.B. McVay Voght, Hannah, Marsee, Beik & Voght, Orlando, Fla., for Humana, Boye, Marino and Daytona.

Clinton R. Batterton, David A. Donohoe, Washington, D.C., and Harold C. Hubka, Daytona Beach, Fla., for Halifax Hosp. Medical Center.

Ronald Harrop and Dennis R. O'Connor, Gurney & Handley, P.A., Orlando, Fla., for Smith and Roberson, M.D.'s.

Emmet J. Bondurant and Michael B. Terry, Bondurant, Mixson & Elmore, Atlanta, Ga., for amicus Hospital Authority of Clarke County.

Janet W. Adams, Adams & Hill, Orlando, Fla., for Ormond Beach Hosp.

Before TJOFLAT, Chief Judge, KRAVITCH, Circuit Judge, and TUTTLE, Senior Circuit Judge.

TJOFLAT, Chief Judge:

We consider this case in light of the en banc court's opinion in *Bolt v. Halifax Hosp. Medical Center*, 874 F.2d 755 (11th Cir.1989) (en banc). In that opinion, the en banc court reinstated part of our earlier panel opinion, *Bolt v. Halifax Hosp. Medical Center*, 851 F.2d 1273 (11th Cir.1988). The portion discussing whether the appellees were exempt from federal antitrust liability under the state-action doctrine, *see id.* at 1279-84, remains vacated. For purposes of consolidation, we vacate the remainder of our earlier opinion and adopt the following in its stead:

In this case, a physician whose medical staff privileges were revoked at each of three hospitals brought suit against the hospitals, members of their medical staffs, and a local medical society, alleging violations of federal antitrust laws. The district court entered verdicts for all the defendants, and the physician now appeals. We affirm in part and reverse in part.

I.

In 1979, Dr. Richard A. Bolt arrived in Daytona Beach, Florida, intending to practice surgery there. Upon his arrival, he applied for staff privileges at three area hospitals, Daytona Community Hospital (DCH), Halifax Hospital Medical Center (HHMC), and Ormond Beach Memorial Hospital (OBMH). DCH is a subsidiary of Humana, Inc., which owns and operates several hospitals throughout the United States. HHMC is a special taxing district of the State of Florida, which funds and operates a medical facility also known as Halifax Hospital Medical Center.[1] OBMH is operated as a private, nonprofit organization.

With respect to staff privileges, each hospital's bylaws were essentially the same. Only a physician who had been granted staff privileges could use the hospital's facilities. A physician would receive privileges upon obtaining an "appointment." An appointment lasted for one year; at the end of the year, the physician would be considered for "reappointment" for another one-year term. During the first two appointment terms, the physician would be a probationary member of the medical staff. After two years, he or she could apply for elevation to active staff membership. When the physician applied for elevation, three outcomes were possible: reappointment and elevation, reappointment for another year without elevation (in which case the physician could apply again for elevation the following year), or denial of reappointment.

The bylaws delineated a specific process for decisions affecting staff privileges, including decisions concerning reappointment and elevation to active staff membership. First, a credentials committee, composed of active staff members, would make a recommendation based

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[1] *See* 1979 Fla.Laws ch. 79-577. In this opinion, we refer to the taxing district and the medical facility interchangeably as "HHMC."

on the physician's medical charts and other pertinent information. That recommendation would be taken up by an executive committee, also composed of active staff members. The executive committee would conduct a more extensive investigation and then reach a decision. If the decision was adverse to the physician under consideration, the physician could appeal to a judicial review committee, which had discretion to conduct its own investigation; like the credentials and executive committees, the judicial review committee would be composed of active staff members. The recommendations that emerged from the various committees would in every case ultimately be considered by the hospital's governing board, which was responsible for reaching the final decision.

In the fall of 1979, DCH, HHMC, and OBMH each granted Dr. Bolt an initial appointment. Dr. Bolt understood that, pursuant to the bylaws of each hospital, he would remain on probationary status until the fall of 1981, at which time he would be considered for elevation to active staff membership. In the fall of 1979, Dr. Bolt also applied for and was granted provisional membership in the Volusia County Medical Society (VCMS), a local professional organization for physicians.

On September 10, 1981, the DCH credentials committee met to consider whether Dr. Bolt should be reappointed and elevated to active staff membership. In its report to the executive committee, the credentials committee noted that it had received complaints about Dr. Bolt's hostile, disruptive, and antagonistic behavior from the DCH's nursing staff, patients, physicians, and administration. After considering the multiple difficulties Dr. Bolt had encountered both in the DCH and in other hospitals within the community, the credentials committee voted to recommend conditioning Dr. Bolt's reappointment on his agreement to seek psychiatric counseling through the Impaired Physicians Program operated by

the Florida Medical Association. On September 22, the executive committee adopted the credentials committee's recommendation and notified Dr. Bolt that his name had been forwarded to the Impaired Physicians Program. Dr. Bolt immediately responded that he would not participate in the program, and the executive committee thereafter voted to deny reappointment.[2]

The day after the DCH executive committee notified Dr. Bolt of its decision to forward his name to the Impaired Physicians Program, the OBMH credentials committee met and voted to recommend that Dr. Bolt be denied reappointment. The OBMH executive committee sustained the credentials committee's recommendation on October 27.[3]

Meanwhile, sometime in September,[4] the HHMC credentials committee met and voted to recommend that Dr. Bolt be denied reappointment. The executive committee subsequently voted to sustain the recommendation and notified Dr. Bolt of its decision on October 13.[5]

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[2] Apparently, Dr. Bolt's existing appointment had not yet expired, and he therefore continued to admit patients to DCH for some time after the executive committee's decision. The executive committee subsquently voted to suspend Dr. Bolt's privileges for the remainder of his initial appointment term.

[3] At the time of the decision, Dr. Bolt's existing appointment at OBMH had not yet expired. In addition to denying reappointment, the executive committee summarily suspended Dr. Bolt's privileges for the remainder of his initial appointment term.

[4] The record does not reveal the precise date.

[5] A letter to Dr. Bolt, dated October 13, 1981, summarized the basis for the HHMC executive committee's action:

> The above action was deemed necessary because you failed to satisfactorily complete your probationary period which began in September 1979, and adverse letters of recommendation were received from the President of the Medical Staff, the Chairman

Thus, during the months of September and October 1981, the executive committees at all three hospitals took action against Dr. Bolt. Over the following several

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of the Department of Surgery, and the Chief of the Subsection of General Surgery, based on the unanimous opinion of the members of that Subsection.

Specifically, since your probationary period began in September 1979, you have consistently evinced behavior that has been:

1. Hostile, disruptive and antagonistic to other health professions, to wit:

   Incident on IMC, February 28, 1981; incident on 3-Central, February 22, 1981; incident on ISC, July 1980.

   Incident involving case review on Mr. Clayton Black, brought up ten months after his death, July 22, 1981.

   Incident at Daytona Community Hospital Operating Room, where you insulted and degraded another doctor in the presence of nurses, August 1981.

2. Unethical:

   You have not dealt honestly and forthrightly with patients and colleagues, in violation of Paragraph 2 of the Preamble of the American Medical Association *Principles of Medical Ethics*. Specifically, in your letter of June 15, 1981, to Alvin E. Smith, M.D., you falsely charged four physicians with providing inadequate coverage to patient Betty Jones. You attempted to solicit this patient to make written complaints against her doctors, and attempted to undermine this patient's confidence in her doctors.

3. Unprofessional:

   You called the family of Maribelle Wynn, deceased patient, and told them that she need not have died and advised them that they had legal recourse in a subsequent call. This occurred shortly after her demise and resulted in unnecessary pain, suffering and doubt for her loved ones, thus perverting the traditional role of physician in our society.

   You passed retention sutures through an abdominal wound in Patient Schmidt at Daytona Community Hospital in March 1981, without benefit of anesthesia, either local or general, causing this patient unnecessary pain and suffering and provoking a disturbance and incredulity in family members aware of their loved one's needless discomfiture.

months, Dr. Bolt prosecuted appeals at all three hospitals. At HHMC, the judicial review committee found no reason to disagree with the executive committee's decision, and the board of trustees subsequently voted to ratify that decision. At DCH, the judicial review committee did disagree with the executive committee's decision; in fact, it voted to reappoint Dr. Bolt unconditionally. The board of trustees rejected the judicial review committee's decision, however, and ratified the executive committee's decision. Finally, at OBMH, the proceedings before the judicial review committee were still pending at the time Dr. Bolt instituted this suit, and Dr. Bolt has not pursued those proceedings to their conclusion.

In March 1982, Dr. Bolt filed a complaint in the district court containing federal antitrust claims, federal constitutional claims, federal contract claims, and a variety of pendent state law claims. Named as defendants were DCH,[6] HHMC, OBMH, the Volusia County Medical Society (VCMS), and five physicians: Drs. Richard Boye, Ralph Marino, Alvin Smith, Shederick Roberson, and Willis Stose.[7] Each of the individual defendants had played

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> This behavior is not only unprofessional, but is adverse to good patient care *a priori*.
>
> There are many other incidents which could be cited to demonstrate the disturbing pattern of behavior which has resulted in this proceeding. The above are cited with some specificity so that you will have the opportunity to respond to them.
>
> The Executive committee contends that this behavior, as illustrated by the above incidents, is well below the standards and goals of the Medical Staff of Halifax Hospital Medical Center, is adverse to good patient care, and is inimical to the Hospital and the Medical Staff.

[6] Also named as a defendant was Humana, Inc., DCH's parent corporation. When we refer to DCH in its capacity as a defendant, we mean both DCH and Humana, Inc.

[7] Also named as defendants were Drs. C.R. DeArmas, Jr. and Thurman Gillespy, Jr. The district court dismissed Drs. DeArmas and Gillespy before trial, and Dr. Bolt does not challenge that ruling in this appeal.

some official role in the privileges decision at one of the hospitals. Dr. Boye, chief of staff at DCH, had served on DCH's credentials and executive committees; he had also served on DCH's board of trustees. Dr. Marino, chief of surgery at DCH, had served on DCH's credentials and executive committees. Dr. Smith, chief of staff at HHMC, had served on HHMC's credentials and executive committees. Dr. Roberson, chief of surgery at HHMC, had served on HHMC's executive committee. Finally, Dr. Stose, chief of surgery at OBMH, had served on OBMH's credentials and executive committees.

This appeal concerns only Dr. Bolt's federal antitrust claims; we relegate our discussion of his other claims to the margin.[8] As to the antitrust claims, Dr. Bolt alleged

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[8] The federal antitrust claims were contained in count I of the complaint. Count II contained claims under 42 U.S.C. § 1983 (1982). Citing several defects in the procedures the defendants used in reaching their decisions to revoke his staff privileges, Dr. Bolt alleged in count II that the defendants had deprived him of his fourteenth amendment rights to due process and equal protection of the laws.

Count III was styled "federal contractual claims." In that count, Dr. Bolt alleged that the three hospitals, as participants in the federal Medicare program, had a contractual obligation to the United States government to comply with certain federal regulations pertaining to peer review procedures. Dr. Bolt alleged that the three hospitals had failed to comply with these regulations and had therefore breached their contractual obligation to the United States government, and that he, as a third-party beneficiary, had suffered an actionable harm.

Counts IV through X contained a variety of state law claims. In count IV, Dr. Bolt alleged that when he was first granted probationary privileges by the three hospitals, each hospital implicitly promised that his privileges would be terminated according to the procedures set out in the hospital's bylaws. Each hospital, Dr. Bolt alleged, had breached that promise, and Dr. Bolt requested the court to enter an injunction requiring the hospitals to reinstate his privileges. Count V contained claims for interference with prospective economic advantage. Count VI contained claims under Florida antitrust laws. Count VII contained claims for intentional infliction of

that the defendants had conspired, along with unnamed co-conspirators, to restrain competition in violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1988).[9] Specifically, Dr. Bolt alleged the existence of three separate conspiracies: one involving DCH and the members of its medical staff who took part in the DCH peer review decision to revoke his privileges, one involving HHMC and the members of its medical staff who took part in the peer review decision there, and one involving DCH, HHMC, OBMH,[10] the members of their staffs who took part in their peer review decisions, and VCMS.

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emotional distress. Count VIII contained a claim for slander, and counts IX and X each contained a separate claim for libel.

The defendants moved the district court, pursuant to Fed.R.Civ.P. 56, to enter summary judgment on all counts. The court denied summary judgment on the federal antitrust claims and the state law claims. It granted summary judgment on the section 1983 claims, but only insofar as those claims pertained to DCH, VCMS, Drs. Boye, Marino, and Stose. With respect to those defendants, the court held that the requisite state action was missing. As for the section 1983 claims against the remaining defendants—HHMC, Dr. Smith, and Dr. Roberson—the court indicated that it would defer ruling on the motion for summary judgment and would sever the claims so that the parties could proceed to trial on the federal antitrust and state law claims.

The parties thus proceeded to trial. As explained in the text, the district court ordered Dr. Bolt to present his evidence of conspiracy first. After he had done so, the defendants moved the district court for directed verdicts on the federal antitrust claims, and the court granted the motions. The court thereafter granted the pending motions by HHMC, Dr. Smith, and Dr. Roberson for summary judgment on the section 1983 claims. Having thus disposed of all the federal claims, the court dismissed the state law claims without prejudice.

[9] Dr. Bolt also alleged that the defendants had conspired to engage in a monopoly in violation of 15 U.S.C. § 2 (1988). Our discussion of the conspiracy element of Dr. Bolt's section 1 claims also applies to the conspiracy element of his section 2 claims.

[10] Although the complaint alleges a conspiracy involving HHMC and members of its medical staff, and another conspiracy involving

Before trial, the district court convened a hearing to resolve several pending motions. One of these was a motion by the defendants concerning the order of proof at trial. Noting that a claim under section 1 of the Sherman Act requires proof of (1) a contract, combination, or conspiracy in violation of the antitrust laws, and (2) a restraint on competition,[11] the defendants requested that the district court require Dr. Bolt to present his evidence regarding the contract, combination, or conspiracy element first. The defendants urged that this course would be an efficient one; if Dr. Bolt's evidence of concerted action proved insufficient to go to the jury, the district court could enter directed verdicts for the defendants at the close of that evidence, thus saving Dr. Bolt from presenting unnecessarily his evidence of restraint on competition. The district court agreed that this would be an efficient way to proceed and accordingly ruled that Dr. Bolt would be required to present his evidence of concerted action first.

The defendants also moved the district court to rule prior to trial that any evidence attacking the merits of the staff privileges decisions at the three hospitals would be inadmissible. Dr. Bolt proposed to show that certain members of the peer review committees knowingly

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DCH and members of its medical staff, the complaint does not allege another separate conspiracy involving OBMH and members of its medical staff. This may be because the OBMH governing board had not taken final action against Dr. Bolt at the time he instituted this lawsuit. In any event, the complaint alleges that OBMH defendants—OBMH and Dr. Stose—took part only in the larger conspiracy involving all three hospitals, members of their medical staffs, and VCMS.

[11] Section 1 provides as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

15 U.S.C. § 1 (1988).

suborned false and fabricated evidence against him. He proposed, moreover, to establish that these members had personal motives for subverting the peer review proceedings. Finally, he proffered that, through the testimony of Dr. Edward R. Woodward, Chairman of the Department of Surgery at the University of Florida Medical School, he would prove that at least some of the alleged grounds supporting the hospitals' actions against him were pretextual. Specifically, Dr. Bolt wished to attack those grounds that pertained to specific medical cases in which he had been involved, he informed the court that Dr. Woodward had reviewed the medical files for those cases and was prepared to testify that no legitimate basis existed for the charges leveled against Dr. Bolt. The district court rejected Dr. Bolt's proffers, ruling that Dr. Bolt was precluded, as a matter of law, from attacking any of the grounds upon which the hospitals had relied in revoking his medical staff privileges.

The case proceeded to trial before a jury, Dr. Bolt put on his evidence of conspiracy first, as required by the district court's pretrial ruling. At the close of this evidence, the defendants moved the court to enter directed verdicts pursuant to Fed. R. Civ. P. 50(a). The court granted the motions, ruling, in a memorandum order, that Dr. Bolt had failed to adduce evidence of an unlawful contract, combination, or conspiracy, within the meaning of section 1 of the Sherman Act, sufficient to take the case to the jury. Dr. Bolt now appeals.

As we state above, this is our second panel opinion in this case. In our first effort, we held that the appellee hospitals and their medical staffs were exempt from federal antitrust liability under the state-action doctrine of *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). *See Bolt v. Halifax Hosp. Medical Center*, 851 F.2d 1273, 1284 (11th Cir. 1988). We reached this holding after concluding that Florida's regulatory scheme provides for judicial review of medical peer review board

decisions that is sufficiently probing to constitute "active state supervision" under *Parker*, as recently interpreted by the Supreme Court in *Patrick v. Burget*, 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988). *See Bolt*, 851 F.2d 1281-84. Our earlier decision was vacated, however, when the case was taken en banc. *See Bolt v. Halifax Hosp. Medical Center*, 861 F.2d 1233, 1234 (11th Cir. 1988). At oral argument before the en banc court, the appellee hospitals and their medical staffs formally withdrew any claim that they were immune from antitrust liability under *Parker's* state-action doctrine.[12] The en banc court accordingly refrained from deciding the immunity issue and remanded the case to the panel with the instruction that we "reconsider [our] decision in light of the hospitals' and medical staffs' waiver of [state-action] immunity." *See Bolt v. Halifax Hosp. Medical Center*, 874 F.2d 755, 756 (11th Cir. 1989) (en banc).

II.

In this appeal, we are concerned only with the contract, combination, or conspiracy element of Dr. Bolt's section 1 claims; as explained above, the district court based the directed verdicts solely on the perceived deficiency of Dr. Bolt's evidence on that issue. Due to the ordering of proof mandated by the district court, Dr. Bolt had no opportunity to present evidence on the restraint of competition element. Our focus on appeal is therefore a narrow one: with respect to the contract, combination, or conspiracy element of Dr. Bolt's section 1 claims, was the evidence—that which was admitted *and that which should have been admitted*—sufficient to take the case to the jury?

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[12] As we discuss *infra*, HHMC individually presented a new and slightly modified state-action argument in its brief on rehearing en banc.

As we have already noted, Dr. Bolt alleged the existence of three separate conspiracies: (1) a conspiracy involving DCH and members of its medical staff, (2) a conspiracy involving HHMC and members of its medical staff, and (3) a conspiracy involving DCH, HHMC, OBMH, members of their medical staffs, and VCMS. For the sake of convenience, we will refer to those alleged conspiracies as the DCH conspiracy, the HHMC conspiracy, and the community-wide conspiracy. In its memorandum order, the district court discussed only the community-wide conspiracy. Since the court entered directed verdicts in favor of all defendants on all of Dr. Bolt's antitrust claims, however, we must assume that the court found the evidence wanting with respect to each of the conspiracies alleged in the complaint. Our task in this appeal, then, is to determine if the evidence regarding any of the three alleged conspiracies was sufficient to allow the case to go to the jury on the contract, combination, or conspiracy issue. We discuss each conspiracy in turn, beginning with the DCH conspiracy.

A.

The alleged co-conspirators in the DCH conspiracy were DCH and the members of its medical staff who took part in the DCH peer review decision to revoke Dr. Bolt's privileges.[13] These defendants urge us to uphold the district court's directed verdicts on two grounds. First, they argue that DCH and its medical staff were legally one entity and therefore incapable of concerted action within the meaning of section 1 of the Sherman Act. Second, they argue that the directed verdicts were proper because no evidence supported a finding of a contract, combination, or conspiracy. We discuss these arguments in order.

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[13] Of the DCH staff members who participated in the peer review decision, two are named as defendants in this case: Drs. Boye and Marino. In this opinion, we sometimes refer to these defendants and DCH collectively as "the DCH defendants."

1.

To establish a violation of section 1 of the Sherman Act, a plaintiff must prove that two or more distinct entities agreed to take action against him. The directed verdicts in this case would therefore have been proper if, as the defendants contend, the DCH defendants were legally incapable of concerted action within the meaning of section 1 of the Sherman Act. We perceive no basis, however, for holding that the members of a medical staff are legally incapable of conspiring with one another. Each member practices medicine in his individual capacity; each is a separate economic entity potentially in competition with other physicians. *See Cooper v. Forsyth County Hosp. Auth.*, 789 F.2d 278, 282 (4th Cir.) (Motz, J., concurring), *cert. denied*, 479 U.S. 972, 107 S.Ct. 474, 93 L.Ed.2d 418 (1986); *Weiss v. York Hosp.*, 745 F.2d 786, 816 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060, 105 S.Ct. 1777, 84 L.Ed.2d 836 (1985).

Additionally, we perceive no basis for holding that a hospital is legally incapable of conspiring with the members of its medical staff. Relying on the rule that a corporation cannot conspire with its officers and directors, *see, e.g., Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 455 & n.7 (9th Cir. 1979), some courts have held that a hospital cannot conspire with its medical staff for purposes of section 1 liability. *See, e.g., Weiss*, 745 F.2d at 817; *Buckner v. Lower Florida Keys Hosp. Dist.*, 403 So.2d 1025, 1029 (Fla. Dist. Ct. App. 1981). We find this analogy faulty, however. The rule for corporations is based on considerations unique to the corporate context. Theoretically, a "conspiracy" involving a corporation and one of its agents would occur every time an agent performed some act in the course of his agency, for such an act would be deemed an act of the corporation. Thus, the rule that a corporation is incapable of conspiring with its agents is necessary to prevent erosion of the principle that section 1 does not reach unilateral acts. A hospital

and the members of its medical staff, in contrast, are legally separate entities, and consequently no similar danger exists that what is in fact unilateral activity will be bootstrapped into a "conspiracy." *See Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1450 (9th Cir. 1988). In sum, then, we hold that a hospital and the members of its medical staff are all legally capable of conspiring with one another. *See generally* Blumstein & Sloan, "Antitrust and Hospital Peer Review," Law & Contempt. Probs., Spring 1988, at 7, 52-53 (finding this holding in panel's earlier opinion to be "sound").

2.

That the members of the committees could conspire with each other and with their hospital does not mean, however, that every action taken by the committees and hospital satisfies the contract, combination, or conspiracy requirement of section 1 of the Sherman Act. To satisfy that requirement, Dr. Bolt must also prove that the members actually did conspire.

To carry the burden of proof on this issue under section 1, a plaintiff may rely on either direct or circumstantial evidence. *American Tobacco Co. v. United States*, 328 U.S. 781, 809-10, 66 S.Ct. 1125, 1139, 90 L.Ed. 1575 (1946). If the plaintiff provides direct evidence of conspiracy, the case becomes an easy one. Few cases, however, are that easy. Dr. Bolt, like most section 1 plaintiffs, has relied on circumstantial evidence—evidence of irrational conduct that would create an inference of conspiracy.

When relying on circumstantial evidence to prove the existence of a conspiracy, a plaintiff first must show a non-legitimate motive for entering into such a conspiracy. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596-97, 106 S.Ct. 1348, 1361, 89 L.Ed.2d 538 (1986). In other words, "the plaintiff must show

that the conspiracy alleged is an economically reasonable one"—i.e., one that would inure to the defendants' economic benefit. *Winn v. Edna Hibel Corp.*, 858 F.2d 1517, 1519 (11th Cir. 1988). Second, a plaintiff must adduce evidence that tends to exclude the possibility that the alleged co-conspirators acted independently and in a manner consistent with rational business objectives. *Monsanto Co. v. Spray-Rite Serv. Co.*, 465 U.S. 752, 764, 104 S.Ct. 1464, 1471, 79 L.Ed.2d 775 (1984); *Winn*, 858 F.2d at 1519-20.

A section 1 plaintiff, however, need not prove an intent on the part of the co-conspirators "to restrain trade or to build a monopoly." *United States v. Griffith*, 334 U.S. 100, 105, 68 S.Ct. 941, 944, 92 L.Ed. 1236 (1948). So long as the purported conspiracy has an anticompetitive effect, the plaintiff has made out a case under section 1. *See NCAA v. Board of Regents*, 468 U.S. 85, 101 n.23, 104 S.Ct. 2948, 2960 n.23, 82 L.Ed.2d 70 (1984); *United States v. Patten*, 226 U.S. 525, 543, 33 S.Ct. 141, 145, 57 L.Ed. 333 (1913); *Hahn v. Oregon Physicians' Serv.*, 868 F.2d 1022, 1026 (9th Cir. 1988), *cert. denied*, —— U.S. ——, 110 S.Ct. 140, 107 L.Ed.2d 99 (1989). Therefore, in determining whether a conspiracy exists, if a motive for the conspiracy is evident, then the court must decide whether the plaintiff has adduced evidence that reaseonably tends to prove a "conscious commitment" on the part of the alleged co-conspirators to enter into a scheme "designed to achieve an unlawful objective." *Monsanto*, 465 U.S. at 764, 104 S.Ct. at 1471. In other words, the evidence must tend to prove (1) an intent to adhere to an agreement (2) designed to achieve an unlawful objective; but the evidence need not show that the co-conspirators specifically intended to restrain trade or to monopolize. We now apply this test to the purported DCH conspiracy.

The alleged DCH co-conspirators argue that they had no rational economic motive for conspiring to deny Dr.

Bolt's hospital privileges. We disagree. One of the first principles of economics is the inverse relationship of supply to price. If doctors in a hospital can exclude other doctors from practicing in that hospital, then obviously the remaining doctors can charge a higher price for their services. *See* Blumstein & Sloan, *supra* at 9, 15. Furthermore, as the defendants' own arguments suggest, a negative decision at one hospital could affect the decision at another hospital; therefore, as two commentators have noted, a negative decision by one hospital could be "tantamount to excluding a doctor from the profession as a whole." *See id.* at 15. Given the ability of a single peer review committee to control the supply of doctors not only at one hospital but also in the profession as a whole, we conclude that there existed a rational economic motive for the DCH defendants to conspire to deny Dr. Bolt's hospital privileges.

We now address the second prong of the contract, combination, or conspiracy test: whether Dr. Bolt presented, *or could have presented,* evidence that tended to exclude the possibility that the alleged co-conspirators acted legitimately and independently. As we note above, our inquiry must focus on two questions: does the evidence tend to prove (1) that the co-conspirators intended to enter into an agreement, and (2) that the agreement was designed to achieve an unlawful objective. Again, we note that the evidence need not prove that the agreement was designed to monopolize or restrain trade but only that it (1) was not designed to achieve a legitimate business purpose and (2) had an anti-competitive effect. *See supra* at 15.

Because the district court refused to admit certain evidence that might have shown the existence of an agreement designed to achieve an unlawful objective, we need not review the district court's decision to grant a directed verdict only in light of the evidence actually admitted.[14]

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[14] We review some of the relevant evidence *infra* 891 F.2d at 826-828.

Instead, we should determine whether the proffered evidence was admissible and, if it was, whether the evidence as a whole was such that "there can be but one conclusion as to the verdict that reasonable men could have reached." *Rabun v. Kimberly-Clark Corp.*, 678 F.2d 1053, 1057 (11th Cir. 1982). We think the proffered evidence was clearly admissible and that, in light of that evidence plus the admitted evidence,[15] reasonable men could disagree with the district court's conclusion that no contract, combination, or conspiracy existed.

As already noted, Dr. Bolt proposed to show that certain members of the DCH peer review committees knowingly suborned false evidence against him and that these individuals had personal motives for subverting the peer review proceedings. He also proposed to use Dr. Woodward's testimony to attack as pretextual some of the grounds of the DCH defendants' decisions. Dr. Bolt indicated in his proffer to the district court that Dr. Woodward's testimony would show that the DCH defendants based their decision in part on two incidents that called Dr. Bolt's medical or professional judgment into question. Dr. Bolt proposed to show that the medical staff at DCH investigated the incidents, and, based on the findings from that investigation, DCH decided to revoke his privileges. Dr. Woodward was prepared to testify that he had reviewed the facts underlying the DCH investigations and had concluded that no reasonable medical practitioner would have reached the same conclusions as those reached by the DCH investigators.[16]

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[15] *See infra* 891 F.2d at 826-828.

[16] The first of these incidents involved a patient at DCH named Maribelle Winn. Mrs. Winn died at DCH while under the care of Dr. Smith, Dr. Bolt, and Dr. Smith's medical partner, Dr. Ruben. Soon after Mrs. Winn's death, Dr. Bolt telephoned her surviving daughters and told them that their mother would not have died but for the negligent care she received from Drs. Smith and Ruben. This action by Dr. Bolt apparently enraged Dr. Smith; in his depo-

The defendants objected to the proffered evidence on two grounds. First, they objected on relevancy grounds, arguing that the proffered evidence failed, as a matter of law, to raise an inference of conspiracy. Second, they objected that even if it were relevant, it should be excluded because it would unnecessarily confuse the jurors by forcing them to consider complicated facts that had no direct relationship to the subject matter of the antitrust litigation. The district court apparently found both these arguments persuasive.

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sition, Dr. Smith remarked that he could have "pinned [Dr. Bolt's] ass to the front door with [his] fist." Some time later, Dr. Schildecker, a pathologist at DCH and a member of the DCH executive committee, conducted an investigation of the Winn death. Dr. Schildecker's conclusion was that Drs. Smith and Ruben had engaged in no wrongdoing. Dr. Bolt, therefore, had apparently acted maliciously and unprofessionally when he called the Winn daughters and told them that their mother had died because of negligent treatment. Dr. Bolt's behavior in connection with the Winn case was apparently used by the executive committee at each hospital (including the executive committee at HHMC, where Dr. Smith was chief of staff) as a ground for revoking his privileges. *See supra* note 24.

Based on his review of the Winn medical file, however, Dr. Woodward was prepared to testify that Mrs. Winn's treatment was in fact so grossly inadequate that it amounted to negligent homicide. From this testimony, a factfinder could conclude that the charge leveled against Dr. Bolt in connection with the Winn matter—that he had acted maliciously and unprofessionally when he telephoned the Winn daughters—was without foundation.

The second incident involved another DCH patient, Harold Schmidt. Some time after undergoing abdominal surgery, Mr. Schmidt's surgical incision burst open. Alerted to the problem, Dr. Bolt went directly to Mr. Schmidt's room and proceeded to pass retention sutures through the wound, without first giving Mr. Schmidt any anesthesia. The Schmidt incident, like the Winn incident, was apparently used by all three executive committees as a ground for revoking Dr. Bolt's privileges. *See supra* note 24. Dr. Woodward was again prepared to testify, based on his review of the Schmidt medical file, that Dr. Bolt's actions were entirely proper in light of the patient's condition.

We conclude that the district court erred to the extent that its exclusion of the Woodward testimony was based on relevancy grounds. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Clearly, Dr. Bolt's proffered evidence was relevant. If the evidence showed that the DCH investigation's conclusions were so baseless that no reasonable medical practitioner, considering the same set of facts, could have reached those conclusions, then a factfinder could easily infer from that evidence that the hospital and its peer review committees intended to enter into an agreement designed to achieve an end not dictated by legitimate business concerns. And, of course, such an agreement would have an anticompetitive effect by excluding Dr. Bolt from competition with other doctors at the hospital.[17]

We recognize that the district court might have excluded Woodward's testimony on the alternative ground that the testimony would unnecessarily confuse the jurors. Under Fed. R. Evid. 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues[] or misleading the jury." We have noted that "[e]xclusion of relevant evidence pursuant to Rule 403 is an extraordinary remedy to be used sparingly." *United States v. Plotke*, 725 F.2d 1303, 1308 (11th Cir. 1984). A trial court's ruling pursuant to Rule 403, however, will not be disturbed absent an abuse of discretion. *See Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1501 (11th Cir. 1985). Assuming that the district court based its ruling on Rule 403, we find such an abuse here.

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[17] Whether that anticompetitive effect was unreasonable is a determination expressly reserved by the district court and thus is not before us now.

The district court misunderstood the legal import of the proffered evidence: in its view, the evidence had no probative value as a matter of law. Although the district court expressly limited its initial inquiry to the contract, combination, and conspiracy requirement, it seemed more concerned with whether the proffered evidence was relevant to the reasonableness of the agreement's anticompetitive effect. The district court noted that proof of a jealous intent on the defendants' part was not relevant because "[u]nder the Rule of Reason only agreements which are unreasonably restrictive of competition violate Section 1 of the Sherman Act." Whether or not the rule of reason applies to this case and whether or not the proffered evidence is relevant to a rule-of-reason analysis are simply not yet at issue. By virtue of the district court's own express limitation, we are concerned only with whether the evidence could tend to support a finding of contract, combination, or conspiracy.

Laboring under its misapprehension of the law, the district court obviously could not have made a sound judgment that the probative value of the evidence was substantially outweighed by the danger of confusing the jury. Because Dr. Bolt's proffered evidence might have provided the only basis upon which the trier of fact could have found a contract, combination, or conspiracy, the probative value of that evidence was extremely high. *See United States v. Russo*, 717 F.2d 545, 551-52 (11th Cir. 1983) (when evidence essential to prove element of offense, probative value very high). We therefore have a "definite and firm conviction" that the district court erred in excluding the proffered evidence and thus abused its discretion. *See Balogh's of Coral Gables, Inc. v. Getz*, 798 F.2d 1356, 1358 (11th Cir. 1986) (en banc).[18]

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[18] We note that the district court apparently believed that Dr. Bolt was precluded, as a matter of law, from attacking the factual basis of the DCH defendants' decision because such an attack would constitute a form of forbidden "de novo review." We are frankly un-

In sum, we conclude that the district court erred in prohibiting Dr. Bolt from introducing evidence that the peer review proceedings were a sham and that the DCH defendants' reasons for revoking his staff privileges were pretexts. When reviewing a district court's grant of a directed verdict or judgment n.o.v., we must view the evidence in the light most favorable to the party against whom the motion for directed verdict or judgment n.o.v. is made. *Hughes v. Equitable Life Assurance Soc'y*, 465 F.2d 743, 744 (5th Cir. 1972).[19] Viewing the proffered and admitted evidence in the light most favorable to Dr. Bolt, we think that it clearly tends to prove the existence of a contract, combination, or conspiracy. We therefore conclude that the district court erred in granting directed verdicts in favor of the DCH defendants.

B.

The HHMC conspiracy is of the same nature as the DCH conspiracy. The alleged co-conspirators are HHMC and the members of its staff who participated in the HHMC peer review decision to revoke Dr. Bolt's privi-

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able to identify the legal basis for this particular conclusion. In its memorandum opinion, the court cited *Sosa v. Board of Managers*, 437 F.2d 173 (5th Cir.1971), as support. *Sosa* involved a physician who sued the board of a state hospital, claiming that the board had violated the due process and equal protection clauses of the fourteenth amendment in denying his application for staff privileges. Reduced to its essentials, the case involved two issues: whether the criteria the board used to judge the plaintiff's application were arbitrary and capricious, and whether the plaintiff had been afforded procedural due process, i.e., notice and a hearing. *See id.* at 176-77. In the present case, however, Dr. Bolt attacks neither the hospitals' procedures nor the substance of the criteria they purported to apply. *Sosa* is plainly inapposite.

[19] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

leges.[20] Because there was evidence that the HHMC executive committee's decision to revoke Dr. Bolt's privileges was based, in part, on his allged misconduct at DCH,[21] our analysis of the DCH conspiracy applies to the HHMC conspiracy as well. The court's error in prohibiting Dr. Bolt from attacking the factual basis of the DCH defendants' decision also infected the directed verdict in favor of the HHMC defendants.

HHMC presents two additional arguments of its own. First, it argues that it was a state agency acting as sovereign and thus, under *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), not subject to antitrust scrutiny.[22] Alternatively, HHMC argues that, even if it is not a state agency, it acted pursuant to state authorization and thus, under *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S.Ct. 1713, 85 L.Ed.2d 24

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[20] Of the HHMC staff members who participated in the peer review decision, two are named as defendants in this case: Drs. Smith and Roberson. In this opinion, we sometimes refer to these defendants and HHMC collectively as "the HHMC defendants."

[21] *See supra* note 5.

[22] This argument should be distinguished from the state-action argument abandoned by all of the defendants at oral argument before the en banc court. This panel had previously concluded that, as *private parties*, the DCH and HHMC defendants were protected by *Parker* because peer review decisions in Florida were sanctioned by a clearly articulated state policy and were actively supervised by Florida state courts. *Bolt v. Halifax Hosp. Medical Center*, 851 F.2d 1273, 1281-1284 (11th Cir. 1988). Having abandoned its *Parker* defense as a private party, HHMC now argues that it is entitled to *Parker* protection simply because it is a state agency. We agree with HHMC that when a state agency's actions are at issue, we need not address the questions of active supervision and clear articulation, *see Hoover v. Ronwin*, 466 U.S. 558, 574, 104 S.Ct. 1989, 1998, 80 L.Ed.2d 590 (1984) (when state acting through courts or legislature, "only requirement is that the action be that of the State acting as a sovereign' "). We therefore address HHMC's new state-action argument.

(1985), avoided the reach of the antitrust laws. We address each argument in turn.

1.

In *Parker*, the Supreme Court held that when a state agency "made no contract or agreement and entered into no conspiracy in restraint or trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government," the agency is not subject to scrutiny under section 1. 317 U.S. at 352, 63 S.Ct. at 314. We need not explore this aspect of HHMC's *Parker* argument in great detail: HHMC simply is not a state agency acting as sovereign.[23]

In *Hoover v. Ronwin*, 466 U.S. 558, 568-69, 104 S.Ct. 1989, 1995, 80 L.Ed.2d 590 (1984), the Supreme Court held that when a state acts through its legislature or supreme court [24] its actions are protected by *Parker* without the showing of clear articulation and active super-

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[23] Even if HHMC is a state agency, *Parker* appears to be inapplicable to this case. The Supreme Court expressly noted that, in the case before it, the state agency "made no contract or agreement and entered into no conspiracy." 317 U.S. at 352, 63 S.Ct. at 314. Thus, the Court addressed only those situations in which the state agency acted unilaterally, as sovereign, in *imposing* the restraint. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), the Court held that when a state agency joins in a private anticompetitive agreement not required by the state, the agency loses its protected status under *Parker*. *Id.* at 790-92, 95 S.Ct. at 2015; *see also* Comment, "The State Action Exemption in Antitrust: From *Parker v. Brown* to *Cantor v. Detroit Edison Co.*," 1977 Duke L.J. 871, 893-95. Dr. Bolt, in the present case, does not allege that HHMC acted pursuant to state requirements, but rather, that it acted in concert with other private individuals. Such conduct on the part of a state agency would remove it from the protection of *Parker*.

[24] The Court expressly reserved the issue of whether a state governor enjoys the same status as the legislative and supreme court for purposes of the state-action doctrine. *See* 466 U.S. at 568 n.17, 104 S.Ct. at 1995 n.17.

vision normally required of nonsovereign parties.[25] The Court went on to hold that, in certain circumstances, a subordinate state agency can claim this special status when acting pursuant to authority delegated by the legislature or supreme court. *Id.*, 104 S.Ct. at 1995. The Court emphasized, however, that an agency may claim this status only if, in discharging its delegated responsibilities, it is closely supervised and controlled by the sovereign—the legislature or supreme court. *Id.* In holding that the actions of Arizona's Committee on Examinations and Admissions constituted the actions of the Arizona Supreme Court, the Court based its decision on the conclusion that the Arizona Supreme Court "itself approved the particular grading formula and retained the sole authority to determine who should be admitted to the practice of law in Arizona." *Id.* at 573, 104 S.Ct. at 1998.

In light of the Court's holding in *Hoover*, we conclude that HHMC's denial of Dr. Bolt's hospital privileges cannot be attributed to the Florida Supreme Court, legislature, or governor. HHMC is a special tax district created by the Florida legislature to serve Volusia County, Florida. 1979 Fla. Laws ch. 79-577, § 1. The legislature created a board of commissioners for the district, to be selected by the govenror, *id.* § 2, and conferred upon the board the power to employ such "agents and employees as may be advisable," *id.* § 3. The enabling legislation requires annual disclosure of the district's financial condition, *id.* § 13, and annual auditing of the district by an independent auditor, with discretionary auditing by the governor through Florida's Auditor General, *id.* § 18. The legislation, however, provides the legislature, supreme court, and governor with no authority to supervise directly the board's personnel decisions, imposing upon the board a general duty to act in a manner consistent with the "public good," *id.* § 5.

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[25] *See supra* note 22.

While the board's decision not to extend hospital privileges to a physician may be reviewed in Florida state courts in the context of a lawsuit, *see North Broward Hosp. Dist. v. Mizell*, 148 So.2d 1, 4 (Fla. 1962), we find nothing to suggest that the Florida Supreme Court, legislature, or governor has the degree of supervision necessary under *Hoover* to imply that acts of the board constitute acts of the sovereign. *See Cine 42nd Street Theater Corp. v. Nederlander Org.*, 790 F.2d 1032, 1036, 1044 (2d Cir. 1986) (agency's leasing power limited only by requirement that proposed project be found likely to improve a decayed area; actions taken pursuant to leasing power not considered sovereign's actions). HHMC cannot claim that, in denying Dr. Bolt's hospital privileges, it is entitled to the special status of state sovereign under *Parker* and *Hoover*.

2.

HHMC argues that, even if it is not a state agency, it is the equivalent of a municipality and therefore exempt from the antitrust laws under *Town of Hallie*.[26] Having determined that HHMC is not a state agency, we now address this argument.

The powers granted to HHMC by its enabling legislation are in many important aspects identical to the powers of a Florida municipality. *Compare* Fla. Stat. chs. 166, 170 (1987) (general municipality powers) *with* 1979 Fla. Laws ch. 79-577 (HHMC enabling legislation). Given the similarities between HHMC and Florida municipalities,

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[26] We note that the immunity from damages provided by the Local Government Antitrust Act of 1984, § 3, 15 U.S.C. § 35 (1988), does not apply to HHMC because the district court entered its order in this case prior to the effective date of the Act. *See id.* § 3(b), 15 U.S.C. § 35(b) ("existence of a . . . district court judgment . . . shall be deemed to be prima facie evidence that subsection (a) of this section [providing for local government immunity] shall not apply").

we conclude thta HHMC's actions should be tested by *Town of Hallie* and its progeny.

In *Town of Hallie*, the Supreme Court held that when a municipality engages in anticompetitive conduct pursuant to a "clearly expressed state policy," the conduct constitutes state action for the purposes of *Parker* even without a showing of active state supervision. 471 U.S. at 40, 47, 105 S.Ct. at 1717, 1720. HHMC argues that it is protected by *Town of Hallie* because it acted pursuant to a clearly expressed state policy to displace competition in the hiring of physicians. We disagree.

The Court in *Town of Hallie* noted that if anticompetitive conduct is a foreseeable result of a legislative grant of power to a municipality, then the municipality would be said to have acted pursuant to a clearly expressed state policy. *Id.* at 41-42, 105 S.Ct. at 1718. By analogy, one could correctly say that when Florida's legislature authorized peer review in licensed medical facilities, *see* Fla. Stat. § 395.011(5), (6) (1987), it could foresee that HHMC would rely on recommendations made by a physician's peers and refuse to deal with (i.e., boycott) that physician. Thus, by granting HHMC the virtually unreviewable power to hire (or not hire) "agents and employees as may be advisable," the Florida legislature clearly articulated a policy to displace competition, at least to the extent that an HHMC decision not to hire a physician can be considered a boycott.

While the Florida legislature must have foreseen that HHMC would engage in anticompetitive conduct based on recommendations of the physician's peers, nothing indicates that the legislature should have foreseen the type of anticompetitive conduct alleged in this case. Dr. Bolt has alleged that HHMC not only relied on the peer review committee's recommendations but also *conspired* with that committee to deny his privileges on pretextual grounds. If HHMC did conspire, as Dr. Bolt alleges, its conduct

constitutes anticompetitive conduct that is not a foreseeable result of HHMC's enabling legislation and that is, in fact, prohibited by the requirement that HHMC act in a manner consistent with "the public good," 1979 Fla. Laws ch. 79-577, § 5. *See Stewart v. Stearns & Culver Lumber Co.*, 56 Fla. 570, 48 So. 19, 25 (1908) (Any "*agreement* that in its operation has or may have a tendency . . . to unnaturally control the supply of or to increase the price of or to curtail the opportunity of obtaining useful commodities . . . is regarded as . . . inimical to the public welfare, and therefore against public policy." (emphasis added)).

This court has held that even when state policy displaces unrestrained competition, a municipality-like entity that enters into an unauthorized conspiracy to restrain competition may not claim the protection of *Town of Hallie*. *See Commuter Transp. Sys. v. Hillsborough County Aviation Auth.*, 801 F.2d 1286, 1290-91 (11th Cir. 1986); *see also Independent Taxicab Drivers' Employees v. Greater Houston Transp. Co.*, 760 F.2d 607, 611 (5th Cir. 1985) (city not subject to antitrust constraints where it has *reasonably* exercised state-granted authority), *cert. denied sub nom. Arrow Northwest, Inc. v. Greater Houston Transp. Co.*, 474 U.S. 903, 106 S.Ct. 231, 88 L.Ed.2d 230 (1985). Clearly, Dr. Bolt has alleged that HHMC entered into an unauthorized and unforeseeable conspiracy, and if he is able to prove his allegations, then HHMC's *ultra vires* conduct will not be exempt from antitrust scrutiny.

C.

Finally, we come to the alleged community-wide conspiracy. The alleged co-conspirators here are DCH, HHMC, OBMH, the members of their medical staffs who participated in the decisions to revoke Dr. Bolt's staff privileges, and VCMS. Dr. Bolt's alleges that these defendants conspired to drive him out of the Daytona Beach medical community.

In addressing the question whether the district court erroneously concluded that the evidence of concerted action was insufficient to send the case to the jury, we divide our discussion into two parts. First, we discuss the evidence that relates to the alleged involvement of the three hospitals and their staffs. We then examine separately the evidence that relates to the alleged involvement of VCMS.

1.

The evidence that was admitted at trial relating to the alleged involvement of the three hospitals and their staffs can be broken down into three categories: (1) evidence of parallel action, (2) evidence of inter-hospital communication, and (3) direct evidence that the decisionmakers at the three hospitals agreed among themselves to take concerted action to drive Dr. Bolt out of the Daytona Beach medical community.

The evidence of parallel action was that, during the months of September and October 1981, the executive committees at each hospital voted to recommend that Dr. Bolt be denied both elevation to active staff membership and reappointment.

The evidence of inter-hospital communication falls into three subcategories. First, there was evidence that the individual defendants had ample opportunity to communicate among themselves about Dr. Bolt. Each of the individual defendants held staff privileges at more than one of the three hospitals; most of them held staff privileges at all three. Second, there was evidence of actual inter-hospital conversations about Dr. Bolt. For example, Dr. Smith, chief of staff at HHMC, approached Dr. Boye, chief of staff at DCH, in January 1981 and suggested that Dr. Boye encourage Dr. Bolt to seek counseling through the Impaired Physicians Program.[27] Third, there

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[27] Additionally, in December 1981, Dr. Boye appeared in proceedings before the HHMC judicial review committee in connection with

was evidence that each hospital's executive committee based its decision, at least in part, on Dr. Bolt's alleged misconduct at one of the other two hospitals. For example, as we note above, after the HHMC executive committee voted to revoke Dr. Bolt's privileges, it sent him a letter listing eight grounds for its decision; three of those grounds pertained to incidents that occurred at DCH. Moreover, Dr. Bolt testified that Dr. France, chief of staff at OBMH, told him that the OBMH executive committee based its decision solely on incidents that occurred at DCH and HHMC.

Dr. Bolt's testimony was offered as the only direct evidence that the decisionmakers at the three hospitals had agreed among themselves to drive Dr. Bolt out of the Daytona Beach medical community. Dr. Bolt testified that Dr. Marino, chief of surgery at DCH, told him that he, Dr. Marino, had reported to the DCH credentials committee the following remarks of Dr. Stose, chief of surgery at OBMH: "They're going to get rid of [Dr. Bolt] at [HHMC]; therefore, we got to talk about getting rid of him at [OBMH]." Dr. Bolt also testified that Dr. Marino told him that he, Dr. Marino, had told the DCH Credentials Committee: "Listen, here's the plan. They're going to get rid of him at [HHMC]. That means we're going to get rid of him at [OBMH] and I think because [the] other two hospitals are going to get rid of him, we've got to seriously think of getting rid of him at [DCH]."

We conclude that this evidence, which was admitted at trial, was not sufficiently probative of conspiracy to withstand the motions for directed verdicts. The rule in this circuit is that evidence of conscious parallelism does not

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its review of the HHMC executive committee's decision to revoke Dr. Bolt's privileges. Dr. Marino, chief of surgery of DCH, also appeared at those proceedings. Dr. Patel, chief of staff at OBMH, testified at the September 10, 1981 meeting of the DCH credentials committee.

permit an inference of conspiracy unless the plaintiff establishes that each defendant engaging in the parallel action acted contrary to its economic self-interest. *See Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 559 (5th Cir. 1980), *cert. denied*, 454 U.S. 927, 102 S.Ct. 427, 70 L.Ed.2d 236 (1981). Thus, the plaintiff must establish that each defendant would have acted unreasonably in a business sense if it had engaged in the challenged conduct unless that defendant had received assurances from the other defendants that they would take the same action. This record contains no evidence that any such assurances were received.

The evidence of inter-hospital communication is also insufficient to permit an inference of conspiracy. It is well settled that the mere opportunity to conspire among antitrust defendants is insufficient to permit the inference of conspiracy. *See Cooper v. Forsyth County Hosp. Auth.*, 789 F.2d 278, 281 (4th Cir.), *cert. denied*, 479 U.S. 972, 107 S.Ct. 474, 93 L.Ed.2d 418 (1986); *see also Oreck Corp. v. Whirlpool Corp.*, 639 F.2d 75, 79 (2d Cir. 1980), *cert. denied*, 454 U.S. 1083, 102 S.Ct. 639, 70 L.E.2d 618 (1981); *Feldman v. Jackson Memorial Hosp.*, 571 F. Supp. 1000, 1008 (S.D. Fla. 1983), *aff'd*, 752 F.2d 647 (11th Cir.), *cert. denied*, 472 U.S. 1029, 105 S.Ct. 3504, 87 L.Ed.2d 635 (1985). That the defendants might have talked among themselves about Dr. Bolt's difficulties at the various hospitals is also insufficient to permit an inference of conspiracy. *Cf. Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763-64, 104 S.Ct. 1464, 1470-71, 79 L.Ed.2d 775 (1984); *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 577-78, 45 S.Ct. 578, 583, 69 L.Ed. 1093 (1925); *Cement Mfrs. Protective Ass'n v. United States*, 268 U.S. 588, 605-06, 45 S.Ct. 586, 592, 69 L.Ed. 1104 (1925). The same is true with regard to the evidence that the executive committees based their decisions on Dr. Bolt's misconduct at the other hospitals. Such evidence does not permit an inference of conspiracy

as long as the defendants' actions are attributable to legitimate, independent business reasons.[28] The evidence admitted at trial provides no indication to the contrary.

Finally, the statements by Dr. Marino fail to show the kind of multi-hospital conspiracy that Dr. Bolt alleges. The statements merely establishes that Dr. Marino told the DCH credentials committee (1) that he was aware that the OBMH executive committee was considering revoking Dr. Bolt's privileges based on what had occurred at HHMC, and (2) that since the other two hospitals were considering revoking or had already revoked Dr. Bolt's privileges, DCH should consider doing the same. At most, these statements show that the DCH credentials committee knew of Dr. Bolt's difficulties at the other hospitals and that it might have based its own recommendation at least in part on that information.[29]

In sum, none of the evidence admitted at trial permits an inference of a multi-hospital conspiracy. Viewed in the light most favorable to Dr. Bolt, the evidence merely establishes that decisionmakers at each one of the three hospitals based their decisions at least in part on matters that occurred at the other two hospitals. As we have explained, such evidence by itself does not permit an inference of conspiracy.

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[28] A hospital might have a number of legitimate independent business reasons for disciplining a staff physician based on his or her misconduct at another hospital. For example, a hospital can, under some circumstances, incur tort liability for its failure to screen carefully its professional staff. *See, e.g., Elam v. College Park Hosp.*, 132 Cal.App.3d 332, 183 Cal.Rptr. 156, 161-65 (1982). That a hospital failed to take action against a staff member when it knew or should have known of that member's misconduct at another hospital might very well be relevant to this species of liability.

[29] Dr. Bolt places unwarranted emphasis on Dr. Marino's use of the word "plan." Placed in context, the reference to a proposed course of action at DCH, not to some multi-hospital scheme.

That the evidence submitted is insufficient to take the case of community-wide conspiracy to the jury does not, however, end our inquiry. We must also determine whether the district court erroneously excluded admissible evidence that was probative of the community-wide conspiracy.

As we discuss above, the district court erroneously prohibited Dr. Bolt from submitting evidence that challenged grounds for the defendants' reappointment decisions. Dr. Bolt proposed to show that all three hospitals relied on findings of the DCH investigation that were entirely baseless.[30] As we stated earlier, a factfinder could infer from this evidence, in addition to the evidence admitted at trial, that the parties relied on the same baseless conclusions as part of a scheme to achieve a common illicit end. Because the evidence as a whole could "tend[] to exclude the possibility that [the defendants] were acting independently," *see Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764, 104 S.Ct. 1464, 1471, 79 L.Ed.2d 775 (1984), we set aside the directed verdicts in favor

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[30] It is not clear whether all three executive committees drew up formal lists of charges; if they did, Dr. Bolt did not introduce those documents into evidence. He did introduce a letter he received from the HHMC executive committee in which the committee cited the two DCH incidents as grounds for its own decision. With respect to the OBMH executive committee, the evidence shows only that it relied on unspecified incidents occurring at the DCH; no evidence was introduced showing that the OBMH executive committee relied specifically on the two DCH incidents in question. Nonetheless, we think that the jury could infer from the evidence before it that the OBMH executive committee did rely on those incidents; the evidence does show that an administrator at OBMH contacted an administrator at DCH and requested information from Dr. Bolt's disciplinary file. Of course, the OBMH defendants will have the opportunity to show, on remand, that they did not rely on DCH incidents or that the DCH incidents upon which they relied did not include the two incidents to which Dr. Woodward's testimony pertains.

of the DCH defendants, the HHMC defendants, and the OBMH defendants with respect to their involvement in the community-wide conspiracy.

2.

The evidence relating to Volusia County Medical Society's alleged involvement in the community-wide conspiracy was as follows. VCMS was a local professional organization that published a periodical known as *The Stethoscope*. The December 1981 edition of this periodical contained an article, authored by the society's president, entitled "The Problem Physician." The article mentioned no particular physician by name but discussed generally the problems associated with physicians whose abrasive personalities disrupt the delivery of medical care in hospitals.

In his brief, Dr. Bolt describes the article in *The Stethoscope* as a clarion call to all physicians to band together and drive him out of the Daytona Beach medical community. He thus claims that VCMS, through its publication, allegedly became an active ringleader in the community-wide conspiracy.

We agree with the district court that this evidence is insufficient to permit an inference that VCMS engaged in concerted action with the other defendants. First, Dr. Bolt's evidence failed to show that the article was directed at him in particular; his conclusion that the author wrote the article with him in mind was pure speculation. More importantly, the supposed "clarion call" was published in December 1981, *after* the executive committees at the three hospitals had already taken action against Dr. Bolt. The evidence that VCMS played any part in the community-wide conspiracy was plainly insufficient to withstand the motion for directed verdict. We therefore affirm the directed verdict in favor of VCMS.

III.

To summarize, we reverse the judgments entered on (1) the directed verdicts in favor of the DCH defendants with respect to their involvement in the DCH conspiracy, (2) the directed verdicts in favor of the HHMC defendants with respect to their involvement in the HHMC conspiracy, and (3) the directed verdicts in favor of the DCH defendants, the HHMC defendants, and the OBMH defendants with respect to their involvement in the community-wide conspiracy. We affirm the judgment in favor of VCMS.

We do not hesitate to say that the district court's handling of this case was unfortunate. The better course would have been to defer ruling on the motions for directed verdict until after Dr. Bolt had presented his entire section 1 case. In their briefs, the appellees vigorously argue that Dr. Bolt must prove, as part of his section 1 case, that their actions actually restrained competition; they contend that the directed verdicts were proper because the evidence adduced at trial was wholly deficient in this regard. Whatever the theoretical merits of their legal arguments, the fact remains that the district court entered the directed verdicts before Dr. Bolt reached that part of his case involving restraint on competition. We reiterate that our focus in this appeal has been a narrow one: whether Dr. Bolt's evidence with respect to the contract, combination, or conspiracy element of his section 1 claims was sufficient to withstand the motions for directed verdict. Other potential legal issues in this case are better left for resolution on the basis of a more fully developed record.

AFFIRMED in part, REVERSED in part, and REMANDED.

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 82-122-Orl-Civ-EK

RICHARD A. BOLT, *et al.*,
Plaintiffs,

vs.

HALIFAX HOSPITAL MEDICAL CENTER, ETC., *et. al.*,
Defendants.

MEMORANDUM ORDER

In this multi-count action plaintiffs sought damages against defendants alleging, in the first four counts of the complaint, violation of the Sherman Act, 15 U.S.C. §§ 1 and 2, Clayton Act, 15 U.S.C. §§ 13, 14 and 15, the Civil Rights Act, 42 U.S.C. § 1983, the Medicare Act, 43 U.S.C. § 1395, and in counts 4, 5, 6, 7, 8 and 10, plaintiffs sought damages in state cases of action, including interference with plaintiff's contractual rights, alleged interference with prospective economic advantage, intentional infliction of emotional distress, slander and libel. In the early stages of the proceedings, counts 3, 8 and 9 were dismissed, and all defendants, except Halifax Medical Center were dismissed as to the § 1983 action.

Following argument on the defendants' motions for summary judgment on the antitrust counts and § 1983 actions, the Court denied the motion on the antitrust counts and severed the § 1983 action to enable the court to review the record and determine whether summary judgment should be granted or the matter referred back to the Medical Center for further hearings. The Court

has not determined that summary judgment is appropriate on the § 1983 claims.

Pursuant to *United States v. James*, 590 F.2d 575, 578 (5th Cir.) (en banc), *cert. denied*, 442 U.S. 917 (1979) and *Paul F. Newton & Co. v. Texas Commerce Bank*, 630 F.2d 1111, 1121 (5th Cir. 1980), the court held that the plaintiffs must establish through independent evidence, the existence of a conspiracy before any alleged co-conspirator's hearsay statements might be introduced into evidence in the conspiracy action. In *United States v. James, supra*,[1] a criminal prosecution, and *Paul F. Newton & Co. v. Texas Commerce Bank, supra*, a civil conspiracy action, the court held that one seeking to have admitted into evidence statements of alleged co-conspirators [referred to as hearsay] must first establish by evidence, independent of the alleged co-conspirator's statements, that (1) there was a conspiracy, (2) that the declarant and the party against whom the statement is offered were members of the conspiracy, and (3) that the statement was made during the course of and in furtherance of the conspiracy.

Presentation of evidence commenced and continued for some five days, numerous witnesses, depositions and exhibits were laid before the jury. Thereafter, following argument, the court granted defendants' motion for a directed verdict.

I.

Plaintiff, Richard A. Bolt, is a vascular and general surgeon. He moved to Daytona Beach, Florida some time in 1979 and commenced practicing his profession. Soon thereafter, he formed Richard A. Bolt, M.D., P.A., a professional corporation under which he practiced and carried on his profession. He sought and was granted

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[1] *See also United States v. Salisbury*, 662 F.2d 738, 740 (11th Cir. 1981), *cert. denied*, 457 U.S. 1107 (1982); Federal Rules of Evidence 104.

associate or probationary staff privileges at Halifax Hospital Medical Center[2] (Halifax), Daytona Community Hospital, a private hospital operated for profit, and owned by Humana of Florida, Inc., a subsidiary of Humana, Inc., a national corporation, with its principal office in Louisville, Kentucky, (Community), and Memorial Hospital of Ormond Beach, (Memorial), a nonprofit corporation organized and existing under the laws of Florida. Likewise, Dr. Bolt made application for and was granted a provisional membership in Volusia County Medical Society, Inc. (Medical Society).

Admission to the staff of the various hospitals and to membership in Medical Society is governed by their by-laws.[3]

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[2] Halifax is a hospital or facility owned and operated by a taxing district created under the laws of Florida, and administered by a Board of Commissioners appointed by the Governor of Florida which is expressly instructed to appoint an appropriate staff to operate the hospital for the general public and taxing district.

[3] Article VII of the By-Laws of Halifax provide for appointments of the Medical Staff.

Section 1, A provides:

> A. The Board of Commissioners shall consider recommendations of the Executive Committee of the Medical Staff and shall appoint to the Medical Staff physicians and dentists who meet the qualifications for membership as determined by the Board of Commissioners. Each member of the Medical Staff shall have appropriate authority and responsibility for the care of his patients, subject to such limitations as are contained in these By-laws and in the By-laws, Rules and Regulations of the Medical Staff and subject further to any limitations attached to his appointment or assignment of privileges.

Section 1, B provides:

> B. In appointment and reappointment of each Medical Staff member, and in the assignment of privileges, specific consideration shall be given to the character, professional competence, qualifications and ethical standing of the applicant, his clinical judgment in the treatment of patients, his attendance at Medical Staff Meetings and participation in staff affairs, active par-

The problems in this case first arose over the complaints filed by a nurse or nurses in the operating room of Halifax. Based upon such complaint, Dr. Roberson filed a complaint with Dr. Alvin Smith, President of the Staff. At a meeting of the Executive Committee of the staff, with Dr. Bolt present, it voted to place Dr. Bolt on "department probation" for one year. Dr. Bolt requested a judicial committee hearing to review the action of the Executive Committee. At a hearing before the Committee, evidence was presented that operating room personnel in

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ticipation in staff affairs, active participation in continuing post-graduate medical education, compliance with the Hospital By-Laws and the Medical Staff By-laws, Rules and Regulations, coopeartion with hospital personnel, use of the hospital's facilities for his patients, whether his professional conduct and ethics are in keeping with the standards of the Medical Staff and whether his activities are or have been disruptive to the efficient operation of the hospital or otherwise inimical to the best interests of the hospital or the Medical Staff.

The By-laws of the other hospitals are similar and are therefore not set out in this opinion.

The By-laws of the Medical Staff of Halifax Hospital provide for (1) a Credentials Committee which shall review the credentials of all applicants and make recommendations for membership and report to the Executive Committee; to periodically review all information available regarding the competence of staff members; make recommendations for granting of privileges and reappointments; and make reports, to investigate any breach of ethics reported, review reports referred to it; (2) an Executive Committee to represent and act on behalf of the Staff, to receive and act on Committee reports, to make recommendations to the Governing body, to review the credentials of all applicants to the Staff, and to make recommendations for staff privileges; review periodically information regarding performance and clinical competence of staff members and other practioners and make recommendations for reappointments and renewals of privileges, to take all reasonable steps to ensure ethical conduct and competent clinical performance; (3) a Judicial Review Committee which shall conduct all hearings requested by a practitioner pursuant to Article VIII, appeals of adverse action.

three area hospitals had reported they dreaded to work for Dr. Bolt because he was profane and abusive; that he screamed at the nurses and threw instruments; that he on one occasion insisted on "bumping" the operating room schedule of other physicians so that he could perform two emergency operations of his own, and when the nurse in charge of scheduling tried to arrange for him to inform the bumped surgeon, he became profane and abusive. He admitted he used profanity; but attempted to excuse his conduct by saying others also used profanity. Several doctors talked to Dr. Bolt and suggested he mend his ways. In his defense, Dr. Bolt presented testimony and affidavits of other nurses and other personnel setting forth he had not been abusive to them.[4]

The Judicial Committee decided that the Executive Committee's investigation had not established any adverse impact on patient care, but that it could not condone Dr. Bolt's conduct. The proceedings ended without any disciplinary action being taken against Dr. Bolt. Dr. Bolt appealed the decision to the Board of Commissioners, which affirmed the decision of the Judicial Committee.

In the fall of 1981, Dr. Bolt applied for permanent staff privileges at each of the three hospitals. The Credential Committee of Halifax, after lengthy hearings, recommended denial. Review of the Judicial Committee was requested. Hearings were held and witnesses presented. Dr. Bolt was present and cross-examined the witnesses but presented no evidence. The Judicial Committee voted to deny staff privileges on April 21, 1982.

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[4] Negative evidence has little or no probative value, particularly in the light of positive evidence to the event by credible witnesses. *Walling v. Greyhound Corporation*, 341 F.2d 521 (6th Cir. 1965); *Dean v. Southern Railway Co.*, 327 F.2d 757 (6th Cir. 1964). Positive testimony to a fact, uncontradicted, will prevail over negative testimony. *Green v. Kansas City Southern Ry. Co.*, 399 F. Supp. 1180 (D.C. La. 1975); *aff'd* 538 F.2d 897 (5th Cir. 1975).

Dr. Bolt's applications to Community and Memorial followed a similar pattern with similar results.

A great majority of the doctors, who were members of the staff of one hospital, were also members of the staffs of the other hospitals. Too, those who served as members of a committee of one hospital, at times, also served on committees of the other hospitals, so that information presented to the Credential Committee of one hospital was also known or presented to the committees of the other hospitals. That is, the hospitals exchanged information.

While some of Dr. Bolt's appeals from actions of the Boards of some of the hospitals were pending, he filed this law suit, and he did not further pursue the appeals. Thus, he did not exhaust his administrative remedies.

II.

In ruling on a motion for a directed verdict in this case, the court is governed by the decision of *Boeing Company v. Shipman*, 411 F.2d 365 (5th Cir. 1969), holding that the "court should consider all of the evidence" and that a "mere scintilla of evidence is insufficient to present a question for the jury." The decision may not be reached by a determination of which side has the better of the case, but it turns on whether there is "a conflict in substantial evidence" in order to create a jury question. To submit the issue to the jury, the evidence must be of some quality and weight that reasonable and fair-minded persons in the exercise of impartial judgment would differ. What the court must decide is, whether, after considering all of the evidence, it would rationally support a verdict for the non-moving party. If it would not, then it is the duty of the court to grant the motion. *See also Williams v. City of Valdosta*, 689 F.2d 964, 970 (11th Cir. 1982); *Rabun v. Kimberly Clark Corporation*, 678 F.2d 1053, 1057 (11th Cir. 1982).

III.

Plaintiff asserted that defendants entered into a conspiracy in restraint of trade or commerce as prohibited by 15 U.S.C. § 1, and to monopolize or attempt to monopolize a part of the trade or commerce as prohibited by 15 U.S.C. § 2, known as the Sherman Act, and a conspiracy to violate the Clayton Act, 15 U.S.C. §§ 13, 14 and 15. The evidence presented failed to bring the case within the provisions of those statutes.

A.

In argument on the defendants' motion for summary judgment or a directed verdict on the antitrust claims, plaintiff asserted that a conspiracy could exist between

(a) members of the hospital staff;

(b) staff and the hospital

(c) the hospitals; and

(d) hospital and doctors.

Plaintiff argued that a conspiracy had been established between the hospitals and doctors because of the exchange of information between the hospitals. He asserted that a conspiracy had been established between the doctors because Drs. Roberson and Stose stated to Nurse Schultz, who had been asked by Dr. Bolt to appear before the committee examining charges against him, that she was not required to appear and testify, and one of the said doctors told her she might find it upsetting or embarassing.

Further, plaintiff asserted Medical Society had been established as a member of the conspiracy, because its president wrote and caused to be published an article in the Medical Bulletin of the Volusia County Medical Society, entitled "The Problem Physician." Therein, he outlined problems of the Society and doctors in dealing with their fellow doctors.

Among other things, plaintiff complained that the hospitals had abandoned their authority to the medical staffs.[5]

Defendants assert the evidence is totally lacking of any antitrust conspiracy; that as to the Sherman Act violation, the plaintiff has failed to establish "a specific intent to destroy competition or build a monopoly . . . *Times-Picayone, supra*, 345 U.S. at 626, 73 S.Ct. at 890; [other citations omitted]" *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1219 (9th Cir. 1977); that the review of all applications for appointment and the annual reappointment to all categories of the medical staff and the clinical evaluation of the quality of medical care provided to all categories of patients is required by the Rules of the Department of Health and Rehabilitative Services of the State of Florida Administrative Code, Sections 10D-28.56(1)(f); 10D-28.58(2)(d) and (f); that plaintiff filed this suit before some of the hospitals actually took action; that the incidents concerning nurse Schultz dealt with a department proceeding and not one for reappointment of the staff; that the evidence presented fails to raise an inference of a conspiracy or violation of any of the plaintiffs rights, but rather shows that the defendants acted entirely properly and in accordance with their duties and the law; and particularly, that no antitrust violation had been shown, as none of the named defendants were in competition with plaintiff, that they had no economic interest in the action, nor would interference with plaintiff's business or practice enure to their benefit.

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[5] Plaintiff presented the testimony of several members of the Governing Boards of the hospitals concerning their vote in upholding or overriding the recommendations of the hospital staff. Nothing in any of this testimony could be taken to indicate the Boards had surrendered their authority to the medical staff. The evidence was clear that great weight was particularly on the questions of qualifications of the applicants.

B.

Plaintiff asserts that the evidence established parallel business behavior sufficient to find that there was a Sherman Act violation. On the other hand, defendants assert that the decision of each of the governing boards and committees of the hospitals and the Medical Association, stemmed from independent decisions and actions. The Supreme Court "has never held that proof of parallel business behavior conclusively establishes agreement or . . . that such behavior itself constitutes a Sherman Act offense." *Theatre Enterprises Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541, 74 S.Ct. 257 (1954). In *Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 208, (3d Cir. 1980), the Court said:

> Conscious parallelism, albeit some indication of a "silent agreement," is in itself, however, insufficient circumstantial evidence from which to infer an antitrust violation. *See e.g. Theatre Enterprises Inc. v. Paramount Film Distributing Corp., supra; Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed.2d 791 (1978). As we have recently held, before such an inference may be drawn a plaintiff must also show (1) that the defendants acted in contradiction of their economic interests, and (2) that the defendants had a motive to enter into an agreement. *Venzie Corp. v. United States Mineral Products Co., Inc., supra*, 521 F.2d at 1314, *citing First National Bank v. Cities Service Co.*, 391 U.S. 253, 287, 88 S.Ct. 1575, 1591, 20 L.Ed.2d 569 (1968); *Delaware Valley Marine Supply Co. v. American Tobacco Co., supra.* Absent such additional evidence a directed verdict or a judgment notwithstanding the verdict should be granted.

See also Venzie Corporation v. United States Mineral Products Company, Inc., 521 F.2d 1309, 1314 (3d Cir. 1975).

Though the plaintiffs assert existence of an agreement between the defendants, it is denied by each defendant, and the burden is upon plaintiffs to prove the existence of such agreement. As shown above in the *Schoenkopf* case, while conscious parallelism may be some indication of a silent agreement, it "is in itself . . . insufficient circumstantial evidence from which to infer an antitrust violation." 637 F.2d at 208.

C.

The by-laws of the various hospitals provide the procedure for applying for admission to their staff. They are substantially similar. Application with supporting data is filed, referred to a credentials committee, which after examination and such investigation as it deems necessary and proper, makes a recommendation to the medical staff as its Executive Committee, which in turn makes recommendation to the Governing Board. It approves, rejects, refers it back for further study or action, and in some cases, may call for a joint meeting with the medical staff or its Executive Committee.

The by-laws of the hospital and its medical staff set forth the criteria for making recommendations for refusing, granting, curtailing or suspending staff privileges, and give authority to the Governing Board to act. "This is a right which private hospitals clearly had at common law." *Waters v. St. Francis Hospital, Inc.*, 618 F.2d 1105, 1107 (5th Cir. 1980). Not only is the authority provided by the by-laws, and permitted by common law, but such is authorized by Florida statutes 1981, Chapter 395, Section 395-065. Delegated to the medical staff of any hospital licensed pursuant to that chapter is the authority to suspend, deny, revoke or curtail the staff privileges of any staff member for cause. Section 395-0653 provides that nothing in its provisions shall restrict the authority of the medical staff of the hospital to review for approval or disapproval all applications for appointment

and annual reappointment to all categories of the staff and make recommendations on each of the governing authority, and each applicant shall be considered on an individual basis. The Rules of the Department of Health and Rehabilitative Services of the State of Florida, Florida Administrative Code, Chapter 10D, Section 28.56 requires that the hospital organization shall have an effective governing authority responsible for the legal and moral conduct of the hospital, and in fulfilling this function shall be organized under approved written by-laws, rules and regulations which shall

> (b) provide for the appointment, reappointment for dismissal of members of the medical staff, and a procedure for hearing and appeal. No action or appointment, reappointment or dismissal shall be taken without prior referral to the medical staff for their recommendation, provided that the governing authority may suspend a medical staff member pending final determination of any reappointment or dismissal. The governing body shall only appoint members of the medical staff as recommended by the medical staff.

Section 28.58 requires that each hospital shall have a medical staff organized under written by-laws approved by and responsible to the governing authority for the quality of all medical care provided to patients, and for the ethical and professional practices of its members. Subsection (2) provides that the medical staff shall determine the function of the various committees and that the functions are carried out, including,

> (d) Review of all applicants for appointment and annual reappointment to all categories of staff, and recommendations on each to the governing authority, including delineation of privileges to be granted . . . and right of hearing and appeal. Recommendation to the governing body for the withdrawal of any privi-

leges . . . or dismissal from the medical staff will be made only after a thorough investigation by the medical staff or a committee thereof . . . with . . . the right of hearing before the medical staff or a committee thereof.

(e) Clinical evaluation of the quality of medical care provided to all categories of patients . . .

The evidence presented in some five days of testimony fails to establish a lack of compliance by any defendant with the provisions of the by-laws of the hospitals or medical staff, or of any applicable law in conducting the investigation, hearings, appeals and decisions.

C.

A conspiracy consists of a combination of two or more persons to accomplish an unlawful act or to accomplish a lawful act in an unlawful manner. A civil conspiracy does not in itself create liability. It must pursue an independent unlawful means in order to establish liability. A conspiracy made illegal under 15 U.S.C. § 1 is a conspiracy in restraint of trade or commerce. The antitrust laws were enacted for the protection of competition, not competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S.Ct. 690, 697 (1977). The first requirement of any conspiracy is the establishment of an agreement among the conspirators, along with the fact that the agreement is to do an unlawful act, or a lawful act in an unlawful way.

Here, there is a lack of evidence to show an agreement to do an unlawful act or a lawful act in an unlawful way. The first complaint or plaintiff's conduct came from a nurse or nurses. It was reported to the medical staff. The staff provided for an investigation, hearing and determination, all in accordance with the by-laws. The applications for reappointment to the staff were handled in the same manner. Even if it were established that

some of the procedures provided for in the by-laws were not carried out, such would not in and of itself establish a conspiracy. The filing of charges, the conduct, investigations, hearings and appeals are called for by the statute, rules and regulations, and by the by-laws of the hospitals. In fact, the provisions of the by-laws are mandatory.

Plaintiff asserts that defendants were jealous or displeased with him and therefore sought to remove him from the hospital staff. But even if that be so, "evil intent alone is insufficient to establish a violation" of the antitrust laws under the Rules of Reason applicable to this case *Northwest Power Products, Inc. v. Omark Industries, Inc.*, 576 F.2d 83, 90 (5th Cir. 1978). Under the Rule of Reason only agreements which are unreasonably restrictive of competition violate Section 1 of the Sherman Act, *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S.Ct. 502 (1911); *MCI Communications, Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081, 1139 (7th Cir.), *cert. denied*, 104 S.Ct. 234 (1983).

In reality, what plaintiff seeks to do is to have the court substitute its judgment for that of the proper committees or Boards of the Hospital and Medical Society. It "is the Board, not the court which is charged with providing a competent staff of doctors," and no "court should substitute its evaluation of such matters for that of the Hospital Board." *Sosa v. Board of Managers of the Val Verde Memorial Hospital*, 437 F.2d 173, 177 (5th Cir. 1971).

IV.

Plaintiff's § 1983 claim exists only against Halifax, the other defendants having been previously dismissed. In the complaint filed herein, Dr. Bolt asserts he was denied due process because (1) his offer to submit a written memorandum concerning his appeal to the Judicial Review Committee was not received, (2) the Medical staff was informed of the Executive Committee's action with-

out providing a right to appeal, (3) he was not afforded a right to a hearing and appellate review in compliance with Article VII § 1 of the by-laws; and (4) the credentials committee failed to evaluate him on the basis of his training, skill and experience.

First, the memorandum which Dr. Bolt sought to present was at a meeting of the Board of Commissioners to which Dr. Bolt had appealed the "department probation" and not his staff privilege hearing. True, the memorandum of which he complains was not considered. An earlier memorandum had been timely filed by him and was not considered by the Board. The memorandum complained of was a second one, which was not timely, and was therefore not considered. In not giving consideration to such memorandum, the Board acted on the advice of counsel. Not only did a failure to consider this memorandum not constitute any denial of his due process rights, but no action was taken by the Board against him. Since there was no action taken, there could not have been a denial of due process.

The second and third contentions are without merit. Dr. Bolt was not denied his right to appeal. The evidence is clear he did appeal. The matter was referred to a Judicial Committee, which conducted a hearing covering some five days of testimony.

Lastly, he complains the Credentials Committee failed to evaluate him on the basis of his training, skill and experience. The record is clear. It received reports from the President of the Medical Staff, the Chief of Surgery, Chief of the Subsection of General Surgery and members of the Medical Staff. Not only did the Committee consider his training, skill and experience, as called for by the by-laws, but as required by the by-laws, it considered his ethical standing, and his moral, emotional, physical and mental status. In deciding whether to grant staff privileges, it is not only proper, but here it was the duty

of the Committee "to evaluate those personal qualities of a physician that reasonably relate to his ability to function effectively within a hospital environment . . . his ability to work with others . . . a factor that could significantly influence the standard of care his patients received," for "[D]ue process does not limit the hospital's consideration to technical medical skills." *Schlein v. Milford Hospital*, 423 F. Supp. 541, 544 (D. Conn. 1976); *aff'd on other grounds*, 561 F.2d 427 (2d Cir. 1977). *See also, Schooler v. Navarro County Memorial Hospital*, 375 F. Supp. 841, 842 (N.D. Texas 1973), *aff'd without opinion*, 515 F.2d 509 (5th Cir. 1975); *Gilbert v. Johnson*, 419 F. Supp. 859, 870 (N.D. Ga. 1976). "The hospital, and not the courts, must set the level of competence to be required to staff members." *Laje v. R.E. Thomason General Hospital*, 564 F.2d 1159 (5th Cir. 1977). The Board may even require additional standards beyond the minimal criteria specified in the by-laws. *Sosa v. Board of Managers of Val Verde Memorial Hospital*, 437 F.2d 173, 176 (5th Cir. 1971) and its decision may be based upon "such as the professional and ethical qualifications of the physicians or the common good of the public and the hospital." *Id.*, *Foster v. Mobile County Hospital Board*, 398 F.2d 227, 230 (5th Cir. 1968).

Further, Dr. Bolt did not exhaust his administrative remedies. He says that while the matter was pending before the Judicial Committee he filed this action and that the Committee should have ceased to act, because he felt that by his actions in filing suit, the Committee would be prejudiced. He does not deny he failed to appear for scheduled hearings. Under the by-laws he waived his rights to review. He was provided with the reasons for his refusal of staff privileges, afforded a full hearing, and given an opportunity to and did confront and cross-examine witnesses; he was permitted to present evidence of his own, and was provided an opportunity to a de novo review. Though he was not permitted to have his counsel

cross-examine witnesses, he was not titled to that right. The contentions raised by Dr. Bolt are, in the most part, answered by the decision in *Woodbury v. McKinnon*, 447 F.2d 839 (5th Cir. 1971). *See also, Sosa v. Board of Managers, etc., supra.*

Defendants were exercising the discretion vested in them under their by-laws and state statutes. Section "1983 was not intended to be a vehicle for federal court corrections of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees." *Wood v. Strickland*, 420 U.S. 308, 326, 95 S.Ct. 992, 1003 (1975). It is perfectly clear that staff appointments may be constitutionally refused if based, as they were here, upon a reasonable basis such as the professional and ethical qualifications of the physician. *Sosa v. Board of Managers, etc., supra.*

The evidence is totally lacking in support of any denial of due process. The § 1983 claim being without merit, summary judgment on that claim is GRANTED.

The federal claims having been disposed of, the court declined to proceed to try and dispose of the state court claims. They are best left for state courts. Such a determination is in keeping with *Owen Equipment and Erection Company v. Kroger*, 437 U.S. 365, 98 S.Ct. 2396 (1978). Here, there are now no federal claims. Diversity jurisdiction does not exist, nor are the non-federal claims ancillary to the federal claim. As held in *United Mineworkers of America v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139 (1966), ancillary jurisdiction need not be exercised in every case in which it is found to exist, as pendent jurisdiction is a doctrine of discretion. To continue with the state claims would require "[N]eedless decisions of state law [which] should be avoided as a matter of comity or to promote justice between the parties . . ." *Id. See also, Ray v. Tennessee Valley Authority*, 677 F.2d 818, 824-25 (11th Cir. 1982); *B.C. Recrea-*

tional Industries v. The First National Bank of Boston, 639 F.2d 828, 834 (1st Cir. 1981); *Goldschmidt v. Patchett*, 686 F.2d 582, 585 (7th Cir. 1982). Here, the only issue upon which the plaintiff has presented evidence is the issue of whether a conspiracy existed so that the court does not deal with a case where all of the evidence has been presented. However, *Gibbs*, *supra* said it might even be appropriate to dismiss the state claim in such a circumstances.

The state claims are therefore DISMISSED without prejudice.

_____

United States District Judge

Norfolk, Virginia

March —, 1984

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 84-3256 & 84-3603

D.C. Docket Nos. 82-00122 & 82-122-ORL-CIV-18

RICHARD A. BOLT, *et al.*,
Plaintiffs-Appellants,

versus

HALIFAX HOSPITAL MEDICAL CENTER, *et al.*,
Defendants-Appellees.

Appeals from the United States District Court
for the Middle District of Florida

Before TJOFLAT, Chief Judge, KRAVITCH, Circuit Judge, and TUTTLE, Senior Circuit Judge.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment as to Volusia County Medical Society is hereby AFFIRMED; the judgments entered on (1) the directed verdicts in favor of the Daytona Community Hospital defendants with respect to their involvement in the Daytona Com-

munity Hospital conspiracy, (2) the directed verdicts in favor of the Halifax Hospital Medical Center defendants with respect to their involvement in the Halifax Hospital Medical Center conspiracy, and (3) the directed verdicts in favor of the Daytona Community Hospital defendants, the Halifax Hospital Medical Center defendants, and the Ormond Beach Memorial Hospital defendants with respect to their involvement in the community-wide conspiracy are hereby REVERSED and REMANDED for further proceedings in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that each party bear their own costs on appeal.

Entered: January 9, 1990
For the Court:
MIGUEL J. CORTEZ
Clerk

By: /s/ David Malaud
Deputy Clerk

Issued as Mandate: Feb. 16, 1990

Supreme Court, U.S.
FILED
APR 11 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1419

In The

Supreme Court of the United States

October Term, 1989

HALIFAX HOSPITAL MEDICAL CENTER,

Petitioner,

v.

RICHARD A. BOLT, and
RICHARD A. BOLT, M.D., P.A.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

HAL K. LITCHFORD
Counsel of Record
MELANIE MALES RUTA
LITCHFORD, CHRISTOPHER & MILBRATH
Professional Association
One duPont Centre
390 North Orange Avenue
Suite 2200
Post Office Box 1549
Orlando, Florida 32802
(407) 422-6600

CLARK HAVIGHURST
Duke University School of Law
Durham, North Carolina 32706
Counsel for Respondents

COASTAL LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (302) 342-2831

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QUESTIONS PRESENTED

1. Whether the conclusion of the court of appeals that sufficient evidence existed to implicate a public hospital in a horizontal anticompetitive scheme that was not the foreseeable result of its enabling legislation in effect in 1981 and 1982 warrants further review by this Court.

2. Whether the Court should now settle a narrow question of law governing the capacity of a hospital and its medical staff to conspire under the Sherman Act in the absence of extensive and irreconcilable conflict among the courts of appeals.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

ADDITIONAL STATUTES INVOLVED vi

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED 5

A. The State Action Issue 5

B. The Conspiracy Issue 11

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp., 456 U.S. 556 (1982) 14

Arizona v. Maricopa County Medical Soc'y., 457 U.S. 332 (1982) 12

Bolt v. Halifax Hosp. Medical Center, 851 F.2d 1273 (11th Cir. 1988) 1

Bolt v. Halifax Hosp. Medical Center, 861 F.2d 1233 (11th Cir. 1988) 1

Bolt v. Halifax Hosp. Medical Center, 874 F.2d 755 (11th Cir. 1989) 1, 6

Bolt v. Halifax Hosp. Medical Center, 891 F.2d 810 (11th Cir. 1990) ..... *Passim*

Boone v. Redevelopment Agency of San Jose, 841 F.2d 886 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 489 (1988) 8, 9

Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982) 7

Consolidated Tel. Cable Serv., Inc. v. City of Frankfurt, 857 F.2d 354 (6th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1537 (1989) 9

Fisher v. City of Berkeley, 475 U.S. 260 (1986) 10

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) ..9, 10

Hahn v. Oregon Physicians' Serv., 868 F.2d 1022 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 110 S.Ct. 140 (1989) 13

Hallie v. Eau Claire, 471 U.S. 34 (1985) 2, 3, 5, 9

TABLE OF AUTHORITIES – Continued

Page

Hancock Indus. v. Schaeffer, 811 F.2d 225 (3rd Cir. 1987) 9

Llewellyn v. Crothers, 765 F.2d 769 (9th Cir. 1985) 8

Oltz v. St. Peter's Community Hosp., 861 F.2d 1440 (9th Cir. 1988) 12

Parker v. Brown, 317 U.S. 341 (1943) 6, 9

Patrick v. Burget, ___ U.S. ___, 108 S.Ct. 1658 (1988) ..4, 15

Pennsylvania Dental Ass'n v. Medical Serv. Ass'n of Pa., 745 F.2d 248 (3d Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985) 13

Royal Drug Co. v. Group Life and Health Ins., 737 F.2d 1433 (5th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985) 13

Virginia Academy of Clinical Psychologists v. Blue Shield of Va., 624 F.2d 476 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981) 13

Weiss v. York Hospital, 745 F.2d 786 (3rd Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985) ..... *Passim*

STATUTES AND RULES:

1979 Fla. Laws Ch. 79-577, §§3, 5 ..... 3, 7, 8

Health Care Quality Improvement Act of 1986, 42 U.S.C. §§11101-11152 (Supp. 1988) 4, 11, 14

Local Government Antitrust Act of 1984, §3, 15 U.S.C. §35 (1988) 3, 10

Rule 11, Fed.R.Civ.P 14

TABLE OF AUTHORITIES – Continued

Page

TREATISES AND ARTICLES:

Blumstein & Sloan, "Antitrust and Hospital Peer Review," Law & Contemp. Probs., Spring 1988, at 7, 52-53 12

ADDITIONAL STATUTES INVOLVED

1979 Fla. Laws Ch. 79-577:

Section 3: The district shall have all the powers of a body corporate, including the power to sue and be sued, to contract and be contracted with, to adopt and use a common seal, to acquire, purchase, hold, lease and convey such real and personal property as may be proper or expedient to carry out the purposes of this act, to appoint and employ an executive director or administrator, chief surgeon, and such other agents and employees as may be advisable, or to borrow money and issue notes, bonds, and other evidences of indebtedness to carry out the provisions of this act.

STATEMENT OF THE CASE

This case was commenced in 1982 when Respondent Richard A. Bolt (*"Dr. Bolt"*) filed a multi-count complaint against three Daytona Beach, Florida, hospitals, including Petitioner Halifax Hospital Medical Center (*"Halifax"*), and certain members of their medical staffs. Dr. Bolt alleged a horizontal, community-wide conspiracy in restraint of trade against these Defendants. Dr. Bolt also alleged separate conspiracies between Halifax and members of its medical staff and a second hospital and its staff. Each of Dr. Bolt's antitrust claims was premised on conduct that occurred in 1981 and 1982 in connection with the sequential denial of his requests for the renewal of staff privileges as a surgeon at each of the three hospitals.

The district court limited the 1984 jury trial to one threshold issue – the existence of concerted conduct, an essential element of Dr. Bolt's antitrust claims. The district court excluded some of Dr. Bolt's most probative evidence and proceeded to direct a verdict in favor of the Defendants. On August 8, 1988, a panel of the court of appeals reversed the district court. *Bolt v. Halifax Hosp. Medical Center*, 851 F.2d 1273 (11th Cir. 1988) (*"Bolt I"*). The Eleventh Circuit subsequently vacated the original panel opinion and *sua sponte* ordered rehearing *en banc* on the state action immunity aspect of the decision. *Bolt v. Halifax Hosp. Medical Center*, 861 F.2d 1233 (11th Cir. 1988) (*"Bolt II"*). At oral argument before the full court, Halifax and the other appellees formally waived any claim that they were immune from antitrust liability under the state action exemption. *Bolt v. Halifax Hosp. Medical Center*, 874 F.2d 755, 756 (11th Cir. 1989) (*en banc*) (*"Bolt III"*). The *en*

banc court vacated the state action portion of the opinion and reinstated the balance. On January 9, 1990, the panel rendered a final consolidated opinion in light of the full court's disposition of the case. *Bolt v. Halifax Hosp. Medical Center*, 891 F.2d 810 (11th Cir. 1990) (*"Bolt IV"*).

Despite Halifax's waiver of its state action exemption before the full court of appeals, the second panel opinion nonetheless addressed two state action issues Halifax belatedly injected into the appeal. *See Bolt IV*, 891 F.2d at 818, n.12. The lower court first rejected Halifax's novel argument that it was a state agency acting as sovereign. *Id.* at 824. The court of appeals then performed a straightforward analysis under *Hallie v. Eau Claire*, 471 U.S. 34 (1985), and concluded that Halifax's involvement in the anticompetitive scheme in 1981 and 1982 was not undertaken pursuant to any clearly expressed state policy. *Id.* at 824-25. Nor was Halifax's conduct the foreseeable result of any legislative grant of power. *Id.* The court of appeals therefore rejected Halifax's new state action arguments. The lower court also found that the evidence that was admitted or proffered was sufficient to go to the jury on the issue of whether Halifax and two members of its medical staff participated in a conspiracy in restraint of trade.

Relying on *Weiss v. York Hospital*, 745 F.2d 786, 816 (3rd Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985), the lower court also concluded that members of a hospital's medical staff have the capacity to conspire *inter se*. *Bolt IV*, 891 F.2d at 819. The court took this reasoning one step further and held that a hospital is also capable of conspiring with the members of its medical staff. *Id.*

The lower court denied Halifax's motion for a stay of mandate pending the submission of a petition for writ of certiorari to this Court. On March 12, 1990, Justice Kennedy denied Halifax's motion for a stay of enforcement of judgment. While Halifax's petition is pending, the parties anticipate further proceedings in the district court, including the scheduling of a new jury trial pursuant to the mandate of the court of appeals.

SUMMARY OF ARGUMENT

The court of appeals performed a straightforward and uncontroversial analysis of the state action question under the standard enunciated in *Hallie v. Eau Claire*, 471 U.S. 34 (1985). The only grant of legislative authority to Halifax regarding the peer review process was a general edict that delegated to Halifax "all the powers of a body corporate" including the nonspecific power to appoint "such other agents and employees as may be advisable." 1979 Fla. Laws Ch. 79-577, §3. The lower court correctly held that Halifax's participation in this particular anticompetitive scheme in 1981 and 1982 was not undertaken pursuant to a "clearly expressed state policy" and was, in fact, contrary to state policy. The decision below is entirely consistent, if not compelled, by the decisions of this Court and does not truly conflict with the decisions of any other court of appeals. In any event, the potential impact of the decision below on similar cases is limited by subsequent legislative developments, such as the Local Government Antitrust Act of 1984, §3, 15 U.S.C. §35 (1988), as well as the unique facts and procedural history of this case. There is no convincing reason for this Court

to review the court of appeals' disposition of the state action issue.

Nor is there any reason for the Court to intercede at this point in the development by the courts of appeals of the law regarding the capacity of a hospital to conspire with members of its medical staff. The "conflict" that Halifax posits is weak at best. The very decision on which Halifax builds its case for certiorari is not entirely consistent with its argument. In *Weiss v. York Hospital*, 745 F.2d 786, 816 (3rd Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985), the Court of Appeals for the Third Circuit held that members of a hospital's medical staff had the legal capacity to conspire among themselves for purposes of the antitrust laws. The Eleventh Circuit followed this aspect of *Weiss* and Halifax does not challenge that part of the decision in the Petition. Moreover, the recent trend developing in the lower courts is in the direction of the Eleventh Circuit's resolution of the question regarding the legal capacity of a hospital to conspire with its medical staff. The lower court's disposition of this issue is also consistent with analogous decisions involving combinations of physicians who have the opportunity to act in an anticompetitive manner. In the wake of the recently-enacted Health Care Quality Improvement Act of 1986, 42 U.S.C. §§11101-11152 (Supp. 1988), the "severe consequences in the health care industry" that Halifax hypothesizes are mythical. Such policy concerns are properly addressed to Congress in any event. *See Patrick v. Burget*, ___ U.S. ___, ___, 108 S.Ct. 1658, 1665 n.8 (1988).

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

A. The State Action Issue

Halifax substantially overstates its case for certiorari on the state action question. The plain wording of the Eleventh Circuit's opinion negates Halifax's interpretation of the decision as the promulgation of a general "bad faith" or "bad motive" exception to the state action doctrine. The court of appeals did nothing more than objectively apply the standard adopted in *Hallie v. Eau Claire,* 471 U.S. 34 (1985), and its progeny to the challenged anticompetitive conduct and determine that there was no "clearly expressed state policy" that authorized or sanctioned it. This Court held in *Hallie v. Eau Claire* that a municipality is entitled to the protection of the state action exemption only where it is engaging in anticompetitive conduct pursuant to a "clearly expressed state policy." 471 U.S. at 40. Halifax argued below that it is the equivalent of a municipality and that its conduct was therefore exempt from antitrust scrutiny under *Hallie v. Eau Claire.* The court of appeals agreed that Halifax was similar to a Florida municipality and tested Halifax's actions under *Hallie v. Eau Claire.* The lower court nevertheless concluded that Halifax failed to demonstrate that it engaged in anticompetitive conduct pursuant to a clearly articulated state policy. *Bolt IV,* 891 F.2d at 825.

The narrowness of the court of appeals' ruling on this point cannot be over-emphasized. When the Eleventh Circuit considered the state action implications of this case *en banc,* Halifax eventually withdrew its claim that it was immune from antitrust liability under the state action exemption:

> In oral argument before the *en banc* court, the appellee hospitals and their medical staffs formally withdrew any claim that they were immune from antitrust liability under the state action exemption. Thus, whether or not the defendants are entitled to immunity under *Parker [v. Brown*, 317 U.S. 341 (1943)]'s state action exemption, they now have clearly waived that immunity in this case.

Bolt III, 874 F.2d at 756. The second panel opinion construed the previous withdrawal of the state action defense as a waiver by Halifax of its *Parker* defense as a private party. *Bolt IV*, 891 F.2d at 823 n.22. Accordingly, the lower court's state action analysis did not turn on the general statutory and regulatory framework governing peer review that was in effect in Florida in 1981 and 1982. Indeed, because of Halifax's previous conduct in the appeal, the court in *Bolt IV* did not cite or discuss the statutory and regulatory laws of general application to the medical staff credentialing process as a possible source of clearly articulated state policy. The lower court's decision was based solely on the provisions of Halifax's enabling legislation. *See* 891 F.2d at 825.

There is only one provision of Halifax's statutory charter that could even arguably support a clearly expressed state policy to displace competition in the hiring of physicians with regulation or monopoly public service. Section 3 of the enabling legislation of Halifax provides in its entirety:

> The district shall have all the powers of a body corporate, including the power to sue and be sued, to contract and be contracted with, to adopt and use a common seal, to acquire, purchase, hold, lease and convey such real and

> personal property as may be proper or expedient to carry out the purposes of this act, *to appoint and employ* an executive director or administrator, chief surgeon, and *such other agents and employees as may be advisable,* or to borrow money and issue notes, bonds, and other evidences of indebtedness to carry out the provisions of this act.

1979 Fla. Laws Ch. 79-577, §3 (emphasis added). It seems self-evident that no intent to authorize anticompetitive conduct in the selection of staff physicians can be inferred from this nonspecific but routine grant of power to a newly-created body corporate.[1] It is even more far-fetched to read into this provision a "clear expression of state policy" that necessarily envisioned that Halifax would participate in a horizontal combination and restraint of trade with other area hospitals. As the lower court also correctly noted, Halifax was required by its enabling legislation to "act in a manner consistent with

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[1] Ironically, a finding of state action immunity based on Halifax's over-generalized enabling legislation would dangerously erode the state action doctrine in the opposite direction of Halifax's contention. Such a conclusion would be overly deferential to the States. The Court has expressly cautioned against this result:

> Acceptance of such a proposition – that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances – would wholly eviscerate the concepts of "clear articulation and affirmative expression" that our precedents require.

Community Communications Co. v. City of Boulder, 455 U.S. 40, 56 (1982), If anything, Halifax's nebulous statutory charter is less explicit than Boulder's home rule charter.

the 'public good'." *Bolt IV*, 891 F.2d at 825, *citing* 1979 Fla. Laws Ch. 79-577, §5.

Thus, Halifax's contention that the decision below conflicts with the decisions of other courts of appeals because it purportedly creates a "conspiracy" exception to the state action doctrine is both misguided and unwarranted. The conclusion by the court of appeals in this case was based on a precise analysis and does not support the proposition that it necessarily created a general and far-reaching "conspiracy" exception to the state action doctrine. Halifax is not entitled to immunity from the antitrust laws if it conspired with its medical staff and conspired with other hospitals because such conduct was unauthorized and unforeseeable under its enabling legislation in effect in 1981 and 1982. In addition, such conduct, which the Eleventh Circuit found was amply supported by the evidence admitted and proffered during the trial, was obviously inconsistent with the "public good" that Halifax was statutorily charged with upholding.

Additionally, the cases on which Halifax premises the existence of a conflict do not actually support its position. The opinions of the courts of appeals for the Third, Sixth and Ninth Circuits, which Halifax cites for the proposition that a "conspiracy" exception to the state action doctrine has or should be rejected, cannot be read that broadly. In *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886, 892 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 489 (1988), *citing Llewellyn v. Crothers*, 765 F.2d 769 (9th Cir. 1985), the Court of Appeals for the Ninth Circuit held merely that the availability of state action immunity "does not depend on the subjective motivations of the

individual actors, but rather on the satisfaction of the objective standards set forth in *Parker* and authorities which interpret it." The Ninth Circuit in *Boone* upheld a state action defense on a finding that the actions of the city and redevelopment agency were taken pursuant to express state policy and were contemplated by the statutory scheme. *Id; accord Consolidated Tel. Cable Serv., Inc. v. City of Frankfurt*, 857 F.2d 354 (6th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1537 (1989); *Hancock Indus. v. Schaeffer*, 811 F.2d 225 (3rd Cir. 1987). The abstract holding that a state actor's subjective motivations are irrelevant in determining state action immunity simply does not equate to an unequivocal rejection of a conspiracy exception. Furthermore, there is no irreconcilable inconsistency between these opinions and the decision below. The Eleventh Circuit here did not inquire into nor rely on any finding that the medical staffs or the hospitals acted in subjective bad faith. The court of appeals merely tested Halifax's objective conduct under the principles of the state action doctrine articulated by this Court in *Hallie v. Eau Claire* and its progeny and held that under these standards, Halifax was not entitled to immunity under the antitrust laws. There is no genuine conflict between these decisions which would warrant certiorari review by this Court.

The lack of true inconsistency among the courts of appeals on this point is further underscored by this Court's own precedent. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975), the Court refused to accord state action immunity when the Virginia Bar "voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim that it is beyond

the reach of the Sherman Act." (Footnote omitted). Analogously, in *Fisher v. City of Berkeley*, 475 U.S. 260, 269-70 (1986), the Court recognized the possibility of a conspiracy exception for private actors who subvert or manipulate a government program for their own anticompetitive ends. Halifax cites no decision from a court of appeals that has distinguished or limited *Goldfarb* while also unequivocally and directly rejecting a "conspiracy exception" to the state action doctrine.

Finally, Halifax's argument that the Eleventh Circuit's decision is the "death knell" of state action immunity is unwarranted hyperbole. Halifax posits that a "conspiracy" exception would swallow the rule because a clever plaintiff could subvert the state action doctrine by expediently alleging the existence of a conspiracy. This apprehension is unfounded. It conveniently overlooks the fact that much more than allegations support the court of appeals' opinion. The lower court found sufficient evidence to establish a *prima facie* case that Halifax and at least two members of its medical staff participated in a conspiracy to rid the medical community of Dr. Bolt. Moreover, Rule 11, Fed.R.Civ.P. ought to function as a safeguard to prevent unsupported accusations of conspiracy from becoming commonplace. Halifax's assertion that the lower court's opinion will drastically affect how public bodies formulate their future conduct is equally disingenuous. Recent intervening congressional legislation ensures that the Eleventh Circuit's decision should not significantly impinge on the manner by which public entities and public hospitals conduct their affairs. The Local Government Antitrust Act of 1984, §3, 15 U.S.C. §35

(1988), enacted after this case was commenced, immunizes most public bodies from antitrust damages. Moreover, public hospitals such as Halifax now have even greater statutory protection by virtue of the Health Care Quality Improvement Act of 1986, 42 U.S.C. §§11101-11152 (Supp. 1988). In sum, the jurisprudential impact of the decision below is likely to be limited because of the intervening legislative developments and the unique facts of the case. Acceptance of this case for review would directly affect only the immediate parties to the proceeding.

B. The Conspiracy Issue

There is no extensive conflict between the lower courts of appeals on the narrow legal question of whether a hospital may legally conspire with its medical staff under §1 of the Sherman Act. The court of appeals in the decision below examined the capacity of the medical staff to conspire both *inter se* and with the hospital. The lower court first agreed with *Weiss v. York Hospital*, 745 F.2d 786, 816 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985), and followed its holding that members of a hospital's medical staff are fully capable of entering into a conspiracy in restraint of trade among themselves:

> We perceive no basis, however, for holding that the members of a medical staff are legally incapable of conspiring with one another. Each member practices medicine in his individual capacity; each is a separate economic entity potentially in competition with other physicians.

Bolt IV, 891 F.2d at 819. Taking this analysis one step further, the Eleventh Circuit then logically concluded that

there was no principled reason for holding that a hospital is legally incapable of conspiring with members of its medical staff. *Id.* Although the court disagreed with *Weiss* on this one point, this partial conflict is hardly the basis for the exercise of certiorari review.

There has not yet developed an extensive, hotly-debated and deep conflict among the courts of appeals on this technical and limited legal question. By all appearances, the conflict may well disappear on its own as a result of future decisions in the various courts of appeals. The trend is definitely away from the talismanic approach of *Weiss*. *See Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440 (9th Cir. 1988). As the Eleventh Circuit acknowledged, *Bolt IV*, 891 F.2d at 819, this part of the decision below has already received favorable commentary from noted authors in the health care field. Blumstein & Sloan, "Antitrust and Hospital Peer Review," Law & Contemp. Probs., Spring 1988, at 7, 52-53. There is no urgent need for the Court to step in and short circuit the development of the law on this narrow question in the courts of appeals.

Other ongoing developments in related areas of health care antitrust jurisprudence are creating precedent that should encourage the adoption of the Eleventh Circuit's analysis and the rejection of the *Weiss* holding on this point. For example, there is a line of authority governing antitrust liability for physician-controlled health care plans that have the ancillary effect of fixing prices or displacing competition. Liability under this precedent turns on the extent to which physicians actually control the terms of the plan. *See, e.g., Arizona v. Maricopa County Medical Soc'y.*, 457 U.S. 332, 352-53 (1982) (maximum fee

schedule drawn up for plan by physician members of medical society condemned; "Even if a fee schedule is desirable, it is not necessary that doctors do the price fixing."); *Hahn v. Oregon Physicians' Serv.*, 868 F.2d 1022 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 110 S.Ct. 140 (1989) (general rule is that "health care plans may reimburse members and nonmembers differently, both in price and manner, so long as physicians (or the relevant group of competitive providers) do not control the health care plan"; evidence of effective control by physicians precluded summary judgment); *Pennsylvania Dental Ass'n v. Medical Serv. Ass'n of Pa.*, 745 F.2d 248 (3d Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985) (effective control of plan by dentists not shown); *Royal Drug Co. v. Group Life and Health Ins.*, 737 F.2d 1433, 1436-37 (5th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985) (same); *Virginia Academy of Clinical Psychologists v. Blue Shield of Va.*, 624 F.2d 476, 480-81 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981) (challenged plans were mere "agents of their member physicians" and were in substance combinations of physicians). These cases illustrate one central point. Under the Sherman Act, courts will carefully examine arrangements in which groups of physicians have the theoretical or actual ability to control the terms on which they compete. In cases where physicians are the *de facto* decisionmakers of what otherwise seems to be an independent entity, this precedent authorizes piercing the formal structure to find the requisite concerted conduct if physicians are in fact "calling the shots". There is no reason to treat hospitals any differently if they permit their decisions regarding medical staff privileges to be effectively

controlled by an anticompetitive cartel of interested physicians. This analogous line of authority ought to foster the ultimate elimination of the conflict by reasoned analysis rather than direct, and possibly premature, intervention by the Court.

Halifax's assertion that the decision of the court of appeals "threatens the destruction of the peer review process," Petition, p. 19, is both exaggerated and misdirected. This now-familiar refrain overlooks the fact that the ruling in *Weiss* which the Eleventh Circuit adopted (and which Halifax does not challenge) has the potential to achieve virtually the same result. If the individual members of a hospital's medical staff are capable of conspiring among themselves, then the individual participants in the peer review process are subjected to the same risk of antitrust liability regardless of the Eleventh Circuit's ruling and regardless of this Court's acceptance of the case. Moreover, even if they lack the capacity to conspire with their medical staffs, hospitals nevertheless may be found vicariously liable for the anticompetitive conduct of their authorized agents. *See American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982). From a practical standpoint, then, the conflict on which Halifax relies is immaterial. Halifax's exaggerated prediction of future "severe consequences" also disregards a number of existing checks and balances. The dire excesses that Halifax apprehends should be sufficiently curbed by application of the Rule of Reason to intrahospital decisions, legislation such as the Health Care Quality Improvement Act of 1986, 42 U.S.C. §§11101-11152 (Supp. 1988), and by Rule 11, Fed.R.Civ.P.

More fundamental, Halifax's policy argument is not a proper basis for seeking certiorari. This argument is the same one that was unsuccessfully advanced in *Patrick v. Burget*, ___ U.S. ___, 108 S.Ct. 1658 (1988) – i.e., the threat of antitrust liability will assuredly deter physicians from participating freely and openly in peer review activities. The Court, however, unequivocally rejected this argument as the basis of its legal decision: "This argument . . . essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such is properly directed to the legislative branch." 108 S.Ct. at 1665. If hospitals believe that the Health Care Quality Improvement Act of 1986 "provides insufficient immunity to protect the peer review process fully, they must take that matter up with Congress." *Id.* at 1665-7 n.8. This Court is the wrong forum for deciding the issues that Halifax attempts to raise in its Petition.

CONCLUSION

Neither issue raised in the Petition merits review by certiorari. Largely because Halifax waived its state action defense during the *en banc* proceedings below, the limited state action analysis in the decision below does not truly conflict with the decision of any other federal court of appeals on the same matter. Regardless, the potential effect of this aspect of the Eleventh Circuit's decision is substantially mitigated by the unique facts and circumstances of the case and intervening federal legislation. The conflict between the lower court's holding on the conspiracy issue and the Third Circuit's treatment of the same matter in *Weiss v. York Hospital* is not substantial

enough to warrant review by the Court at this time. Accordingly, Halifax's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

HAL K. LITCHFORD
Counsel of Record
MELANIE MALES RUTA
LITCHFORD, CHRISTOPHER & MILBRATH
Professional Association
One duPont Centre
390 North Orange Avenue
Suite 2200
Post Office Box 1549
Orlando, Florida 32802
(407) 422-6600

CLARK HAVIGHURST
Duke University School of Law
Durham, North Carolina 32706
Counsel for Respondents

Richard A. BOLT and Richard A. Bolt, M.D., P.A., Plaintiffs-Appellants,

v.

HALIFAX HOSPITAL MEDICAL CENTER, et al., Defendants-Appellees.

Nos. 84-3256, 84-3603.

United States Court of Appeals, Eleventh Circuit.

May 16, 1989.

Donald E. Christopher, Orlando, Fla., Clark Havighurst, Durham, N.C., Hal K. Litchford, Litchford, Christopher & Milbrath, P.A., Orlando, Fla., for plaintiffs-appellants.

Elizabeth R. Hilder, F.T.C., Washington, D.C., for amicus F.T.C.

William E. Loucks, Daytona Beach, Fla., for Volusia County Medical Soc.

James E. Slater, Orlando, Fla., for Willis Stose, M.D.

J. Charles Ingram, G.B., McVay Voght, Hannah, Marsee, Blik & Voght, Orlando, Fla., for Daytona, Humana, Boye, Marino.

Clinton R. Batterton, David A. Donohoe, Washington, D.C., Harold C. Hubka, Daytona Beach, Fla., for Halifax Hosp. Medical Center.

Ronald L. Harrop, Dennis R. O'Connor, Gurney & Handley, P.A., Orlando, Fla., for Roberson and Smith M.D.'s.

Adams & Hill, Janet W. Adams, Orlando, Fla., for Ormond Beach Hosp.

Emmet J. Bondurant, Bondurant, Mixson & Elmore, Michael B. Terry, Atlanta, Ga., for amicus Hosp. Authority of Clarke County.

Appeals from the United States District Court for the Middle District of Florida.

Before RONEY, Chief Judge, and TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, CLARK, EDOMDSON and COX, Circuit Judges, and TUTTLE*, Senior Circuit Judge.

PER CURIAM:

We granted rehearing *en banc* in this case, *see Bolt v. Halifax Hosp. Medical Center*, 861 F.2d 1233 (11th Cir.1988), to consider whether the appellee hospitals and their medical staffs were exempt from federal antitrust liability under the state action doctrine of *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), as recently interpreted by the Supreme Court in *Patrick v. Burget*, 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988). A panel of this court had answered this question affirmatively, concluding that Florida's regulatory scheme, which provided for probing judicial review of peer review board decisions regarding medical staff privileges, constituted "active

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* Senior U.S. Circuit Judge Elbert P. Tuttle has elected to participate in further proceedings in this matter pursuant to 28 U.S.C.A. § 46(c).

state supervision" sufficient to invoke *Parker's* state action exemption. *See Bolt v. Halifax Hosp. Medical Center,* 851 F.2d 1273, 1282 (11th Cir.1988).

In oral argument before the *en banc* court, the appellee hospitals and their medical staffs formally withdrew any claim that they were immune from antitrust liability under the state action exemption. Thus, whether or not the defendants are entitled to immunity under *Parker's* state action exemption, they now have clearly waived that immunity in this case. Since we granted rehearing solely to consider this issue, further consideration of the case by the *en banc* court is unnecessary.

The court therefore reinstates the panel opinion, *see Bolt v. Halifax Hosp. Medical Center,* 851 F.2d 1273 (11th Cir.1988), with the exception of the opinion's discussion of the state action exemption, *see id.* at 1279-84, which remains vacated and without precedential value. The case is thus remanded to the panel, which shall reconsider its decision in light of the hospitals' and medical staffs' waiver of immunity and the parties' outstanding petition for rehearing.

IT IS SO ORDERED.

No. 89-1419

APR 20 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HALIFAX HOSPITAL MEDICAL CENTER,
Petitioner,

v.

RICHARD A. BOLT and RICHARD A. BOLT, M.D., P.A.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

REPLY BRIEF FOR PETITIONER

DAVID A. DONOHOE, P.C.*
CLINTON R. BATTERTON
AKIN, GUMP, STRAUSS, HAUER & FELD
Suite 400
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036-1511
(202) 887-4000

HAROLD C. HUBKA
BLACK, CROTTY, SIMS, HUBKA, BURNETT, BARTLETT & SAMUELS
501 N. Grandview Avenue
Daytona Beach, Florida 32118
(904) 274-4480

Attorneys for Petitioner Halifax Hospital Medical Center

* Counsel of Record

April 20, 1990

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. THERE IS A CLEAR CONFLICT BETWEEN THE JUDICIAL CIRCUITS, MANIFESTED BY THIS DECISION, AS TO WHETHER A PUBLIC INSTITUTION'S STATE ACTION IMMUNITY MAY BE ELIMINATED BY AN ASSERTION THAT IT "CONSPIRED" WITH OTHERS	1
II. THE CIRCUIT COURT MADE EVERY HOSPITAL VULNERABLE TO SUIT UNDER THE SHERMAN ACT FOR EVERY PEER REVIEW DECISION ADVERSE TO THE APPLICANT, BY TREATING THE HOSPITAL AND ITS OWN STAFF AS SEPARATE ENTITIES AND THEREFORE CAPABLE OF ACTIONABLE "CONSPIRACY."	5
CONCLUSION	7

TABLE OF AUTHORITIES

Cases: Page

Austin v. McNamara, No. CV 88-04268 (C.D. Cal. Feb. 20, 1990) (WESTLAW, District Courts Database) 4

Bolt v. Halifax Hosp. Medical Center, 874 F.2d 755 (11th Cir. 1989) (en banc) 2

Boone v. Redevelopment Agency of San Jose, 841 F.2d 886 (9th Cir.), *cert. denied*, 109 S.Ct. 489 (1988) 3

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 1984) 6

Fisher v. City of Berkeley, 475 U.S. 260, 106 S.Ct. 1045, 89 L.Ed.2d 206 (1986) 4

Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) 4

Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc., 891 F.2d 1127 (4th Cir. 1989) 3

United States Football League v. National Football League, 887 F.2d 408 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 1116 (1990) 5

Weiss v. York Hosp., 745 F.2d 786 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985) 5, 6

Westborough Mall, Inc. v. City of Cape Girardeau, 693 F.2d 733 (8th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983) 3

Whitworth v. Perkins, 559 F.2d 378 (5th Cir. 1977), *vacated*, 435 U.S. 992, *reinstated on rehearing*, 576 F.2d 696 (5th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979) 3

Statutes:

Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-11152 (Supp. 1988) 4

Local Government Antitrust Act of 1984, 15 U.S.C. § 35 (1988) 4, 5

IN THE

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No. 89-1419

HALIFAX HOSPITAL MEDICAL CENTER,
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RICHARD A. BOLT and RICHARD A. BOLT, M.D., P.A.,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR PETITIONER

ARGUMENT

I. THERE IS A CLEAR CONFLICT BETWEEN THE JUDICIAL CIRCUITS, MANIFESTED BY THIS DECISION, AS TO WHETHER A PUBLIC INSTITUTION'S STATE ACTION IMMUNITY MAY BE ELIMINATED BY AN ASSERTION THAT IT "CONSPIRED" WITH OTHERS.

Respondents attempt to sidestep the clear division among the circuit courts as to whether there is a "conspiracy exception" to the state action doctrine by claiming that the court of appeals below either did not say what it said or that it did not mean what it said.

Respondents begin by "re-interpreting" the lower court's opinion, arguing that the circuit court did not really find a "conspiracy exception" to the state action doctrine. Brief at 5. The court of appeals could not have been any more clear, indeed emphatic, in finding just such an exception:

> While the Florida legislature must have foreseen that HHMC would engage in anticompetitive conduct based on recommendations of the physician's peers, nothing indicates that the legislature should have foreseen the type of anticompetitive conduct alleged in this case. Dr. Bolt has alleged that HHMC not only relied on the peer review committee's recommendations but also *conspired* with that committee to deny his privileges on pretextual grounds.

Petition for Certiorari ("Petition"), Appendix at 27a (emphasis in original). Thus, based entirely upon the allegation that petitioner, Halifax Hospital Medical Center ("Halifax") "conspired" with its own medical staff to deny privileges, in subjective bad faith (on "pretextual grounds," which can scarcely have any other meaning), the court below found that Halifax had no state action immunity.[1]

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[1] Respondents also advance the amazing claim that petitioner "waived" its argument below. As both the en banc opinion and the panel opinion clearly explain, however, the defendants abandoned only the argument that Florida's peer review scheme provides blanket state action immunity for all of the defendants, regardless of whether they are public entities, including the physicians and the private hospitals. Petition for Certiorari, Appendix at 23a n.22. *That* is the "state action" argument which was waived before the en banc court. *Bolt v. Halifax Hospital Medical Center*, 874 F.2d 755 (11th Cir. 1988) (en banc). As the panel correctly noted, Halifax did not waive the entirely separate argument presented here, that Halifax, as a public entity, has a separate source of state action immunity:

> This argument should be distinguished from the state-action argument abandoned by all of the defendants at oral argument before the en banc court.

Petition, Appendix at 23a n.22.

Having distorted the decision below beyond recognition, the respondents attempt to explain away the circuit conflict by arguing that the circuits which flatly refuse to find a "conspiracy exception" to the state action doctrine may not have done so definitively. This is pure invention. For example, in *Boone v. Redevelopment Agency of City of San Jose*, 841 F.2d 886 (9th Cir.), *cert. denied*, 109 S.Ct. 489 (1988), the plaintiff-developers accused the municipal corporation of conspiring with a rival developer, 841 F.2d at 889, and contended that "allegations that city officials acted . . . as participants in a larger conspiracy . . . would strip the city of its antitrust immunity." *Id.* at 892.[2] The Ninth Circuit squarely rejected this argument. *Id.* No amount of circumlocution can change this. The conflict is unambiguous and inescapable.

In a curious passage, respondents, without saying so, attack the Eleventh Circuit's factual determination that Halifax's conduct *was* foreseen ("[T]he Florida legislature must have foreseen that [Halifax] would engage in anti-competitive conduct based on recommendations of the physician's peers . . . ." Appendix at 27a. Respondents blithely assert, "It seems self-evident that no intent to authorize anticompetitive conduct in the selection of staff physicians can be inferred from this nonspecific but routine grant of power. . . ." Brief at 7. It is, to put it mildly, out of place for respondents, a

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[2] Respondents are totally silent as to the cases finding such an exception in other circuits, most notably ignoring *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, 891 F.2d 1127 (4th Cir. 1989), in which the Fourth Circuit acknowledged, one month before the *Bolt* decision was published, that there was a clear division of authority in the circuits, and that the Fourth Circuit had determined to side with the "conspiracy exception" circuits. *See also Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983), and *Whitworth v. Perkins*, 559 F.2d 378 (5th Cir. 1977), *vacated*, 435 U.S. 992, *reinstated on rehearing*, 576 F.2d 696 (5th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

second time, to "defend" the lower court's decision by contradicting it.[3]

Respondents attempt to downplay the serious adverse impact of the "conspiracy exception" adopted below by claiming that the Local Government Antitrust Act of 1984 [4] and the Health Care Quality Improvement Act of 1986 [5] will limit the application of the decision. As noted by the American Hospital Association in their amicus brief, the Health Care Quality Improvement Act may not apply to many privileging decisions or stem the tide of antitrust challenges to routine hospital credentialing decisions. After four years, only one district court opinion interpreting that act has been reported. *Austin v. McNamara*, No. CV 88-04268 (C.D. Cal. Feb. 20, 1990) (WESTLAW, District Courts Database).

Nor has the Local Government Antitrust Act of 1984 rendered the state action doctrine obsolete or unneces-

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[3] Respondents' efforts to buttress their argument by invoking this Court's decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (Brief at 9-10), are wide of the mark. In *Goldfarb*, a county bar association's recommended fee schedule was struck down as price fixing because no state authorization existed for this practice, precisely the opposite of the situation here where the action *was* held to be contemplated; but only the alleged bad faith motive was not. While the state bar association, technically a state agency, was found to have "joined" this conspiracy, the Court did not find a "conspiracy exception" to the state action doctrine, which does not apply at all to conduct not authorized by the state. In *Fisher v. City of Berkeley*, 475 U.S. 260 (1986), cited by respondents for the proposition that this Court might recognize a "conspiracy exception" for *private* parties who somehow corrupted local government, Brief at 10, the Court merely found that the Sherman Act did not preempt a local rent control ordinance. Because the city unilaterally imposed the ordinance on protecting landlords, there was no actionable "conspiracy" with state actors at all. If anything, these decisions further demonstrate that this Court has not yet addressed the issue raised in this petition.

[4] 15 U.S.C. § 35 (1988).

[5] 42 U.S.C. §§ 11101-11152 (1988).

sary. That act, which does not apply to numerous suits, like this one, begun before its passage, provides immunity only from treble damages liability, not from injunctive relief, which is often what disappointed staff privilege applicants most desire, and not from attorneys' fees awards, which can be enormous.[6] Moreover, the Act applies to local government officials "acting in an official capacity." [7]

II. THE CIRCUIT COURT MADE EVERY HOSPITAL VULNERABLE TO SUIT UNDER THE SHERMAN ACT FOR EVERY PEER REVIEW DECISION ADVERSE TO THE APPLICANT, BY TREATING THE HOSPITAL AND ITS OWN STAFF AS SEPARATE ENTITIES AND THEREFORE CAPABLE OF ACTIONABLE "CONSPIRACY."

Confronted with the lower court's square rejection of the holding in *Weiss v. York Hospital*, 745 F.2d 786 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985) that a hospital cannot conspire with its own staff when the peer review process is undertaken, the Respondents brush the "partial conflict" [8] aside and launch into a curious speculation that "the conflict may well disappear on its own." Brief at 12. The basis for this speculation is anything but clear, for respondents nowhere address the anomaly that results from the lower court's ruling—a hospital required by law to conduct privileging proceedings, required by law to do so through its staff, and prohibited by law from doing so other than through its staff, is nonetheless held to be separate from its staff for con-

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[6] *See United States Football League v. National Football League*, 887 F.2d 408 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 1116 (1990).

[7] 15 U.S.C. § 35 (1988).

[8] "Partial conflict," Brief at 12, apparently means that the lower court only disagreed with the central holding of *Weiss*. It is that disagreement we ask this Court to resolve and, so far as we are aware, certiorari is not confined to situations where circuits are in conflict on all issues.

spiracy analysis purposes. As we explained in our Petition, this result runs directly counter to this Court's analysis of intra-enterprise conspiracy in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). See Petition at 15-16.[9]

Rather than address this, respondents refer to cases where physicians control health care plans and, "by analogy," twice make the argument that when one "pierces the formal structure" a hospital is indistinguishable from its staff. Brief at 12-14. From this premise, they reach the astonishing conclusion that a hospital can conspire with persons from whom it is indistinguishable. This is as bad logic as it is, under *Copperweld*, bad law.

From a policy standpoint, respondents argue that the peer review process is already endangered under *Weiss* because the physicians themselves are already subject to antitrust risk. Brief at 14-15.[10] This misses the point. If a hospital is vulnerable to conspiracy charges every time it acts anti-competitively—the denial of privileges being inherently "anti-competitive" from the parochial viewpoint of the rejected physician—then the solution is simple, though horrible. A hospital can easily

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[9] Respondents somehow manage to discuss intra-enterprise conspiracy without mentioning *Copperweld*, in itself quite an accomplishment.

[10] Halifax has not challenged the portion of the *Weiss* analysis permitting antitrust attack on medical staffs viewed as combinations of physicians because that is not Halifax's issue. *Copperweld* holds that "officers or employees of the same firm do not provide the plurality of acts imperative for a § 1 conspiracy," 467 U.S. at 769, but leaves open the issue of whether corporate employees can conspire among themselves if they are "acting on their own behalf." *Id.* at 770 n.15. Whether this exception exists and, if so, what its contours should be, are interesting issues, but Halifax's petition raises only the question whether a legal entity can "conspire" with the only persons through whom it can act and through whom it must act.

protect itself from such charges by *never* denying privileges, regardless of the commands of state law. This tension between state law and antitrust risk deters the policing of physicians by artificially classifying a hospital's privileging process as "concerted action" and thereby directly and adversely affects the quality of care in public hospitals.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID A. DONOHOE, P.C.*
CLINTON R. BATTERTON
AKIN, GUMP, STRAUSS, HAUER & FELD
Suite 400
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036-1511
(202) 887-4000

HAROLD C. HUBKA
BLACK, CROTTY, SIMS, HUBKA, BURNETT, BARTLETT & SAMUELS
501 N. Grandview Avenue
Daytona Beach, Florida 32118
(904) 274-4480

Attorneys for Petitioner Halifax Hospital Medical Center

* Counsel of Record

April 20, 1990

Supreme Court, U.S.
FILED
APR 11 1990
JOSEPH F. SPANIOL, JR.
CLERK

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RICHARD A. BOLT, M.D., P.A.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE AMERICAN HOSPITAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

DIANE P. WOOD
1111 East 60th Street
Chicago, Illinois 60637
(312) 702-3470

JEFFREY M. TESKE
TRACEY L. FLETCHER
American Hospital Association
840 North Lake Shore Drive
Chicago, Illinois 60611
(312) 280-6700

HENRY S. ALLEN, JR.
(Counsel of Record)
McBRIDE, BAKER & COLES
Northwestern Atrium Center
500 West Madison Street
40th Floor,
Chicago, Illinois 60606
(312) 715-5729

April 11, 1990

QUESTION PRESENTED

Whether a hospital and its medical staff conspire for purposes of the Sherman Act when the medical staff makes a credentialing recommendation to the governing board that the board accepts.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 4

I

Importance of Granting the Petition 4

II

This Court's *Copperweld* Decision and Sound Economic Analysis Require a Reversal of the Decision Below 8

A. *Copperweld* Establishes a Functional Economic Test for Determining Plurality of Actors under Section 1 9

B. The Medical Staff Acts for and on Behalf of the Hospital in Fulfilling the Hospital's Exclusive Responsibility for Credentialing 11

C. The *Weiss* Decision Correctly Applies *Copperweld* 13

III

Conclusion 17

TABLE OF AUTHORITIES

	PAGE
Cases	
Bolt v. *Halifax Hospital Medical Center*, 891 F.2d 810 (11th Cir. 1990)	passim
Cooper v. *Forsyth County Hosp. Authority, Inc.*, 789 F.2d 278 (4th Cir.), *cert. denied*, 497 U.S. 972 (1986)	14
Copperweld Corp. v. *Independence Tube Corp.*, 467 U.S. 752 (1984)	passim
Friedman v. *Delaware County Memorial Hospital*, 672 F. Supp. 171 (E.D. Pa. 1987)	5
Marrese v. *Interqual, Inc.*, 748 F.2d 373 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985)	6
Matsushita Electric Industrial Co. v. *Zenith Radio Corp.*, 475 U.S. 577 (1986)	9
McMorris v. *Williamsport Hospital*, 597 F. Supp. 899 (M.D. Pa. 1984)	5
Miller v. *Indiana Hospital*, 843 F.2d 139 (3d Cir.), *cert. denied*, 109 S.Ct. 178 (1988)	14
Monsanto Co. v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984)	9
Nanavati v. *Burdette Tomlin Memorial Hospital*, 857 F.2d 96 (3d Cir. 1988), *cert. denied*, 109 S.Ct. 1528 (1989)	5, 14
N.L.R.B. v. *Yeshiva University*, 444 U.S. 672 (1980)	15
Oltz v. *St. Peter's Community Hospital*, 861 F.2d 1440 (9th Cir. 1988)	5, 14
Potters Medical Center v. *City Hospital Ass'n*, 800 F.2d 568 (6th Cir. 1986)	5
Quinn v. *Kent General Hosp., Inc.*, 617 F. Supp. 1226 (D.Del. 1985)	16
Smith v. *Underwood Memorial Hospital*, 1987-1 Trade Cas. (CCH) ¶ 67,538 (D.N.J. 1987)	5, 16
St. Joseph's Hospital, Inc. v. *Hospital Corporation of America*, 795 F.2d 948 (11th Cir. 1986)	5, 16

PAGE

University of Pennsylvania v. *E.E.O.C.*, 110 S.Ct. 577 (1990) 15

Weiss v. *York Hospital*, 745 F.2d 786 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985) 4, 6, 15

Wilk v. *American Medical Ass'n*, 895 F.2d 352 (7th Cir. 1990) 14

Statutes

Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-11112 (Supp. 1988) 6, 7

Sherman Act, § 1, 15 U.S.C. § 1 (1988) ..... passim

Fla. Stat. § 395.0653(2)(1979) 16

Fla. Stat. § 395.065(1)(1979) 12

Fla. Admin. Code § 10D-28.56 (1979) 12

Treatises

P. Areeda, *Antitrust Analysis* (1986) 13

Articles

Blumenstein and Sloan, *Antitrust and Hospital Peer Review*, 51 Law and Contemp. Prob. 7 (1988) 7

Miscellaneous

American Hospital Association, *Guidelines on the Role and Functions of the Hospital Medical Staff* (April 16, 1986) 11, 12

American Medical Association/American Hospital Association, *Report of the Joint Task Force on Hospital Medical Staff Relationships* (Feb., 1985) ... 11

H.R. Rep. No. 99-903, 99th Cong., 2d Sess., *reprinted in* 1986 U.S. Code Cong. & Admin. News 6287 7

Joint Commission on Accreditation of Health Care Organizations, *1990 Accreditation Manual for Hospitals* 1989 2

PAGE

Joint Commission on Accreditation of Hospitals, *Accreditation Manual for Hospitals* (1981) 13

Office of the General Counsel of the American Medical Association, *Legal Status of the Medical Staff* (May, 1986) 11

Southwick, Arthur F., *The Law of Hospital and Health Care Administration* (1978) 11

No. 89-1419

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HALIFAX HOSPITAL MEDICAL CENTER,
Petitioner,

v.

RICHARD A. BOLT and
RICHARD A. BOLT, M.D., P.A.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE AMERICAN HOSPITAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This brief is filed on behalf of the American Hospital Association in support of Petitioner, Halifax Hospital Medical Center (Halifax). Consent from counsel for all parties has been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The American Hospital Association (AHA) is the primary organization of hospitals in the United States, including in its membership approximately 5,500 hospitals and other health care institutions, and nearly 48,000 individual members. In the increasingly complex environment in which hospitals today operate, the AHA has striven to assist its members to achieve the delivery of quality health care to

the communities that they serve. Nothing is more important to this effort than the implementation of reliable and well-administered systems to assure proper physician "credentialing".[1] Without the ability to assure quality physicians, hospitals would fail in their central mission to patients.

Antitrust analysis of the critical relationship between hospitals and physicians, as it pertains to the evaluation of physicians in state-mandated peer review programs and to other credentialing decisions, must proceed based on an accurate appreciation of the economic interests involved. Such an analysis will show that, for these purposes, the hospitals and their medical staffs operate as a single economic entity. By misunderstanding that relationship, the court below has thrown into doubt literally thousands of peer review programs nationally. In addition, it has placed every hospital in the country in the position of a potential antitrust defendant for every medical credentialing decision that is made. This will impede the AHA's members' ability to obtain the needed input of physicians in staffing decisions. Consequently, unless this Court grants the petition and reverses the decision below, the public's receipt of quality medical care will be adversely affected.[2]

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[1] As used herein, "credentialing" means the process by which the hospital medical staff recommends and the hospital board decides to appoint medical staff members and to award privileges that permit the practitioner to provide medical or other patient care services in the hospital, within well-defined limits. *See, e.g.* Joint Commission on Accreditation of Health Care Organizations, *1990 Accreditation Manual for Hospitals* at 95-117 (1989).

[2] The AHA's brief will address only the second question presented by Halifax in the petition.

STATEMENT OF THE CASE

The AHA adopts the Petitioner's statement of the case, and adds the following points.

First, Dr. Richard A. Bolt alleged several different possible conspiracies in his complaint. Complaint, ¶ 19; *Bolt v. Halifax Hospital Medical Center*, 891 F.2d 810, 818 (11th Cir. 1990). The one relevant to the AHA's brief is the conspiracy between Halifax and two members of its medical staff, Dr. Shedrick H. Roberson, a proctologist, and Dr. Alvin E. Smith, an oncologist. Dr. Smith is Chief of Staff at Halifax and served on Halifax's Credentials and Executive Committees. *Id.* at 816. Dr. Roberson is Chairman of the Department of Surgery and served on Halifax's Executive Committee. These physicians, by virtue of their positions, were required under the hospital's bylaws to participate in the credentialing process. Each "played some official role in the privileges decision" challenged by Dr. Bolt. *Id.* at 816. They are accused of conspiring to include language critical of Dr. Bolt within a staff Judicial Review Committee report utilized in the hospital's determination to exclude Dr. Bolt.[3]

Second, the procedures employed by Halifax in connection with its review of staff physician performance were extensive. Each new physician is given a probationary staff appointment lasting for one year, which is renewable for an additional year. At the end of the second year, the physician may apply for active staff membership. In connection with

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[3] The Eleventh Circuit also considered allegations of conspiracy among other hospitals and members of medical staffs, and a community-wide conspiracy. The parties to those claims included Daytona Community Hospital, Ormond Beach Memorial Hospital, Dr. Boye (an internist), Dr. Marino (an anesthesiologist), Dr. Stose (an orthopaedic surgeon) and the Volusia County Medical Society.

that application, the hospital appoints a Credentials Committee, composed of active staff members. The Credentials Committee's recommendation is reviewed by an Executive Committee, also composed of active hospital staff members. If the Executive Committee's recommendation is negative, the physician may appeal to a Judicial Review Committee, also comprised of active staff members. The final responsibility for appointments rests with the hospital's governing Board of Commissioners.

These procedures were followed in Dr. Bolt's case at Halifax. The Executive Committee prepared a careful statement of the basis for its action recommending that Dr. Bolt be denied reappointment. The Judicial Review Committee found no reason to disagree with the Executive Committee's recommendation, and the Board of Commissioners ultimately decided not to reappoint him. *Id.* at 815.

REASONS FOR GRANTING THE PETITION

I. Importance of Granting the Petition

Compelling reasons exist to grant this writ, and to hear this case now. Not only does the Eleventh Circuit's opinion openly conflict with the Third Circuit's decision in *Weiss* v. *York Hospital*, 745 F.2d 786 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985),[4] but the decision below treats the question of antitrust conspiracy in a way that fundamentally misunderstands this Court's decision in *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984). Further-

[4] The court below, recognizing the conflict, characterized as "faulty" the Third Circuit's decision in *Weiss:* "Relying on the rule that a corporation cannot conspire with its officers and directors, . . . some courts have held that a hospital cannot conspire with its medical staff for purposes of Section 1 liability. . . . We find this analogy faulty, however". 891 F.2d at 819.

more, it presents "an important question of federal law which has not been, but should be, settled by this Court." Supreme Court Rule 10.1(c).

The antitrust implications of the collaboration between hospitals and their medical staffs have been the subject of confusion in the lower courts for some time.[5] Until this Court addresses the problem, hospitals and ultimately the American public will pay the price of excessive expenditures on litigation at a time when hospitals are endeavoring to use their resources more efficiently.

Furthermore, if the decision below stands and physicians playing "some official role in the privilege decision" (*Bolt*, 891 F.2d. at 816) and the hospital board making the decision can "conspire", then theoretically, a "conspiracy" would occur every time the medical staff made a credentialing recommendation that the board accepted (*see infra* pp. 11-13, 16-17). Thus, a unilateral hospital privileging deci-

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[5] In addition to the conflicting decisions in *Weiss*, *supra* note 4, and the court below, *see, e.g.*, Nanavati v. Burdette Tomlin Memorial Hospital, 857 F.2d 96, 118 (3d Cir. 1988), *cert. denied* 109 S.Ct. 1528 (1989) (following *Weiss*); Potters Medical Center v. City Hospital Ass'n, 800 F.2d 568, 573 (6th Cir. 1986) (no conspiracy possible); Oltz v. St. Peter's Community Hospital, 861 F.2d 1440, 1450 (9th Cir. 1988) (finding *Bolt* "persuasive"); St. Joseph's Hospital, Inc. v. Hospital Corporation of America, 795 F.2d 948 (11th Cir. 1986) (suggesting that general *Copperweld* rule does apply to hospital-medical staff arrangements, unless staff has independent personal stake); Smith v. Underwood Memorial Hospital, 1987-1 Trade Cas. (CCH) ¶ 67,538 (D.N.J. 1987); Friedman v. Delaware County Memorial Hospital, 672 F. Supp. 171 (E.D. Pa. 1987); McMorris v. Williamsport Hospital, 597 F. Supp. 899 (M.D. Pa. 1984). Dr. Bolt himself asked the court below for "clarification of the law in this difficult area . . ." Supplemental Brief of Dr. Bolt, April 7, 1988 at 45.

sion would be bootstrapped into a conspiracy. This would punish the coordinated conduct of the board and the medical staff and would discourage the hospital from creating a division of labor whereby the medical staff, on behalf of the hospital, reviews membership applications and makes recommendations to the governing board for its decision (*see infra* pp 11-13, 16-17 and *Weiss, supra* (adopting the reasoning that the medical staff in credentialing matters acts on behalf of the hospital.)) Such coordination has presumed benefits and the loss of these benefits, as *Copperweld* recognizes, would deprive patients of efficiencies that decentralized management brings.

Certainly, in the credentialing process, hospital boards must have the benefit of medical staff recommendations based on the staff's peer review of applicants for staff membership. If that communication is punished and therefore discouraged, the utility of the staff's peer review is diminished. The quality of medical care in the United States depends, as the Seventh Circuit recognized in *Marrese v. Interqual, Inc.*, 748 F.2d 373, 392 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985) on *effective* peer review.

Thus, not one but several of the considerations regarded as "special and important" reasons for granting a writ of certiorari in Rule 10 of this Court's 1990 Rules are present here.[6] These reasons are in no way undercut by Congress's passage of the Health Care Quality Improvement Act of 1986.[7] That statute confers a limited antitrust immunity on physicians and other persons who participate in

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[6] Specifically, this case meets the criteria of Rule 10.1(a), clause 1, and Rule 10.1(c) both clauses. Rules of the Supreme Court, January 1, 1990.

[7] 42 U.S.C. § 11101 et seq. Because Dr. Bolt's case arose before the passage of the Act, it does not apply here.

professional review activities by exempting them from treble damages liability in private suits if the professional review action meets the standards set forth in the statute.[8] However, the prerequisites for immunity are strict enough that the law may not adequately stem the flood of staff privileges litigation.[9] Furthermore, hospital governing boards frequently communicate with medical staff members on legitimate matters not falling within the scope of the Act's immunity provisions.[10] Therefore, the issue presented in this

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[8] 42 U.S.C. §§ 11111(a), 11112(a).

[9] For example, the Act requires that the action must be taken based on a reasonable belief that it was warranted by the facts known. 42 U.S.C. § 11111(a)(4). A disgruntled physician need only allege that no such reasonable belief existed in order to commence a legal action, and perhaps even to survive a defense motion for summary judgment. Immunity is also contingent on the provision of information that is not false, for persons providing information to review bodies. 42 U.S.C. § 11111(a)(2). For a hospital, the practical operation of the Act places the burden on the hospital and the physician defendants to establish that a peer-review decision was based on the physician's competence. *See* 42 U.S.C. § 11151(9) (Supp. 1988); Blumenstein and Sloan, "Antitrust and Hospital Peer Review," 51 Law & Contemp. Prob. 7, 83 n.598 (1988). Indeed, Congress realized when it passed the Act that the reporting system created by the legislation would result in an increase in antitrust litigation. See H.R. Rep. No. 99-903, 99th Cong., 2d Sess. at 3, *reprinted in* 1986 U.S. Code Cong. & Admin. News at 6287. It chose to confer only a limited immunity in response to that problem.

[10] There is no immunity, for example, for peer review activity unrelated to physician competence. 42 U.S.C. § 11151(9)(E) (Supp. 1988). Thus, a medical staff recommendation and hospital board decision to terminate a hospital service, resulting in the termination of a physician's permission to practice, is not covered.

case will continue to be important to hospitals even after the pre-1986 Act cases have all been resolved.

Finally, although the Eleventh Circuit remanded Dr. Bolt's case to the district court for further proceedings, those proceedings will have no bearing on the questions presented here and now. The evidence called for by the Eleventh Circuit on remand has to do with particular proof of the specific elements of a conspiracy, namely: did Dr. Bolt offer evidence tending to exclude the possibility of independent action on the part of the hospital and on the part of the medical staff members? This evidence is irrelevant if the hospital and its staff are properly regarded as one economic unit in the context of peer review. The lower court conceded, correctly, that:

> [t]he directed verdicts in this case would therefore have been proper if, as the defendants contend, the DCH defendants were legally incapable of concerted action within the meaning of Section 1 of the Sherman Act.[11]

Therefore, the Eleventh Circuit itself recognized the central importance of the conspiracy conclusion. This issue is important to the effective functioning of hospitals, and it is ripe for consideration now.

II. This Court's *Copperweld* Decision and Sound Economic Analysis Require a Reversal of the Decision Below

The lower court made two mistakes. First, it ignored *Copperweld* by basing its conclusion that a conspiracy was possible between a hospital and its medical staff on considerations of formal legal status, rather than on economic realities. Second, it fundamentally misunderstood hospital

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[11] 891 F.2d at 818-19.

organization and failed properly to analyze the economic relationship between the governing board and medical staff members.

A. *Copperweld* Establishes a Functional Economic Test for Determining Plurality of Actors Under Section 1.

The requirement of a combination or conspiracy lies at the heart of section 1 of the Sherman Act. This Court has taken pains in recent years to clarify its precise scope, and thereby to ensure that the antitrust laws are invoked only against genuinely anticompetitive arrangements and that they are not used to stifle legitimate business practices. For example, in *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984), in an effort to protect bona fide communications between manufacturers and distributors, the Court held that a conspiracy could be inferred only from "evidence that tends to exclude the possibility of independent action by the manufacturer and distributor." *Id.* at 768. Similarly, guarding against an implausible inference of conspiracy, the Court held in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) that an inference of conspiracy must be reasonable in light of the competing inferences of independent action or collusive action that could not have harmed the plaintiffs. Finally, in *Copperweld*, this Court concluded that a parent corporation is not legally capable of conspiring with its wholly owned subsidiary. 467 U.S. at 752. Those two entities have a "complete unity of interest," pursuant to which the subsidiary must and does act solely for the benefit of the parent.

The court below concluded that the hospital and members of its medical staff were legally capable of concerted action because they were, in the court's view, "legally separate entities." *Bolt*, 891 F.2d at 819. This conclusion ignores the central point of *Copperweld*. Formal legal sepa-

rateness, even where it exists, does *not* suffice to show that two entities can conspire for purposes of the Sherman Act.[12]

The business world is filled with examples of formally separate "persons" whose concerted activity was never meant to be judged under Sherman Act § 1. As the Court pointed out in *Copperweld*, officers and employees of the same firm are surely separate individuals, in law and in fact, but "it is perfectly plain that an internal 'agreement' to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police." 467 U.S. at 769. Similarly, the internally coordinated conduct between a corporation and one of its unincorporated divisions must be understood as unilateral for § 1 purposes. Finally, the direct holding of *Copperweld* was that a parent corporation could not conspire with one of its wholly owned subsidiaries.

The key to ascertaining whether or not the necessary plurality of actors exists lies in whether or not the economic resources that they control are independent. As the Court put it in *Copperweld*, where previously independent interests engage in a "sudden joining of economic resources," a combination or conspiracy for purposes of section 1 is legally possible. On the other hand, where there is a continuation of the same organization of resources, the activities in question are unilateral. Thus, a parent and a subsidiary represent two aspects of the same economic resources, and the establishment of a particular "agreement" between them does not aggregate previously independent sources of economic power. Similarly, where a hospital and medical staff are engaged in the credentialing process, there is no joining of independent economic resources. Instead, it reflects no more

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[12] The medical staff is not, in any event, a legal entity. *See infra* pages 11-13.

than the hospital's division of labor and an acknowledgement that the hospital's sole resource for assessing the quality of its medical services resides within its medical staff.

B. The Medical Staff Acts for and on Behalf of the Hospital in Fulfilling the Hospital's Exclusive Responsibility for Credentialing.

Both as a matter of economic interest and pursuant to applicable state laws, the medical staff acts as an integral part of the hospital's management.[13] "[T]he staff must be held strictly accountable to the governing board for its control of quality. A hospital, therefore, does not consist of two organizations — business administration and medical. Rather, a hospital is a single organization; the medical activities cannot be separated from the business side." Southwick, *The Law of Hospital and Health Care Administration* at 428 (1978).

The American Hospital Association's Guidelines on the Role and Functions of the Hospital Medical Staff state explicitly that:

> [t]he medical staff, working through the hospital medical staff organization, has primary responsibility for developing a governance mechanism that is approved by the governing board and for organizing the medical staff as a body accountable to

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[13] *See, e.g.*, American Medical Association/American Hospital Association, Report of the Joint Task Force on Hospital-Medical Staff Relationships at 9, 11 (Feb. 1985); Office of the General Counsel of the American Hospital Association, Legal Status of Medical Staff (May 1986) (compendium of statutes and regulations of the 50 states and the District of Columbia regarding the responsibilities, roles, and relationship of the hospital, its governing board, and the organized medical staff).

> the governing board for the quality of medical care provided in the institution.[14]

The laws governing Halifax were consistent with these guidelines. Florida law provides that the hospital organization shall have an effective governing authority responsible for the legal and moral conduct of the hospital as a functioning institution. Pursuant to this obligation, the governing body must provide for the appointment, reappointment or dismissal of members of the medical staff. As an integral part of that appointment process, the board seeks the medical staff's "recommendation." Fla. Admin. Code § 10D-28.56 (1979).

Under Florida law, the process for credentialing physicians must comply with the standards outlined by the Joint Commission on Accreditation of Hospitals and the Principles of Participation in the Federal Health Insurance Program for the Aged. Fla. Stat. § 395.065(1) (1979). The 1981 standards, which governed the credentialing process at issue here, provided:

> The governing body shall delegate to the medical staff the authority to evaluate the professional competence of staff members and applicants for clinical privileges. Such delegation, however, does not relieve the governing body of its responsibility for appointing members of the medical staff.

Joint Commission on Accreditation of Hospitals, *Accreditation Manual for Hospitals*, Standard IX, Governing Body, 1981 Ed.

Thus, in the context of credentialing, the role of the medical staff is purely advisory. It has no power to imple-

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[14] American Hospital Association Guidelines, approved by the American Hospital Association General Counsel on April 15-16, 1981, revised April 16, 1986.

ment decisions on its own. No matter how much the credentials committees, executive committees, and judicial review committees say or do with respect to a particular application, only the hospital's board of trustees may make the final decision. In this kind of case, where the coordination "does not create additional market power or facilitate a restraint," and where "one of the alleged co-conspirators has complete control over the situation and can fully implement the alleged restraint without regard to what the other conspirator desires or does," conspiracy analysis makes no sense.[15]

C. The *Weiss* Decision Correctly Applies *Copperweld.*

The facts of the Third Circuit's decision in *Weiss* illustrate the line between unilateral and concerted action nicely in the context of hospital organization. Briefly stated, in *Weiss*, an osteopathic physician (D.O.) sued York Hospital and members of its medical staff for conspiring to deny him staff privileges there. York Hospital for many years had corporate charter and bylaw provisions barring D.O.'s from obtaining privileges, and its medical staff had continued to be exclusively allopathic physicians (M.D.'s). The plaintiff alleged that York applied a discriminatorily high standard for the medical qualifications of D.O.'s, and for those few who passed the test, it conferred only the lowest category of staff privileges.

In a part of the opinion not directly relevant here, the Third Circuit found that the medical staff was a combination of individual doctors who were capable of conspiring

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[15] P. Areeda, Antitrust Analysis ¶ 14.62b, at 222-23 (1986). Professor Areeda argues that conspiracy is an "inapt description of consultation and direction," when one of the parties lacks the legal power to disobey. *Id.* ¶ 14.62c, at 223-24.

among themselves against the plaintiff. As in other cases raising questions of exclusion of an entire class of health care provider, this conclusion apparently rests on the broad economic competition that M.D.'s face from alternative providers.[16] However, the court squarely held that "the hospital cannot legally conspire with its medical staff."[17] It explained why not as follows:

> The medical staff was empowered to make staff privilege decisions *on behalf* of the hospital. As such, with regard to these decisions, the medical staff operated as an officer of a corporation would in relation to the corporation. Although the members of the medical staff had independent economic interests in competition with each other, the staff as an entity had no interest in competition with the hospital. 745 F.2d at 817 (emphasis added).

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[16] *See, e.g.*, Oltz v. St. Peter's Community Hospital, 861 F.2d 1440 (9th Cir. 1988) (conspiracy between anesthesiologists and hospital to exclude nurse anesthetists), Cooper v. Forsyth County Hosp. Authority, Inc., 789 F.2d 278 (4th Cir. 1986), *cert. denied* 479 U.S. 972 (1986) (alleged conspiracy by hospital and orthopaedic surgeons directed against podiatrists; failed for lack of evidence). *Cf.* Wilk v. American Medical Ass'n, 895 F.2d 352, (7th Cir. 1990).

[17] 745 F.2d at 815, 817. The Third Circuit's later opinion in Miller v. Indiana Hospital, 843 F.2d 139, 144 (3d Cir.), *cert. denied* 109 S.Ct. 178 (1988), did not change this part of the holding, for the simple reason that in *Miller*, the court did not understand "the hospital at this stage of the proceeding to be challenging either the elements of conspiracy or the interstate commerce effect of its actions." The court reaffirmed *Weiss* in Nanavati v. Burdette Tomlin Memorial Hospital, 857 F.2d 96, 118 (3d Cir. 1988), *cert. denied*, 109 S.Ct. 1528 (1989).

The *Weiss* court therefore concluded, consistently with *Copperweld*, that no conspiracy was possible between the hospital and its medical staff. The staff members were not competitors of the hospital, and the combination of the staff and the hospital was not an aggregation of previously independent economic forces.

In the health care industry, as in others in which the economic relationships of the different actors will shift depending upon the function they are performing, it is critical that the Court clarify that the *Copperweld* principle forbids subjecting intra-firm decisions to section 1 scrutiny. For example, governance of universities is significantly influenced by independent faculty members, who may decide to deny an appointment or tenure to an individual. It makes no sense to regard the faculty as "conspirators" with their university, even though the university itself may have to answer for discriminatory or other unlawful actions.[18] Only in an exceptional case might a faculty member stand in a competitive relationship with his or her own university, if for instance a dispute over rights to a patent or the like arose.

Some lower courts have identified exceptional cases in which a plaintiff alleges that the medical staff is not acting as the hospital's agent, but instead is pursuing its own

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[18] *Cf.* University of Pennsylvania v. E.E.O.C., 110 S.Ct. 577 (1990). In National Labor Relations Board v. Yeshiva University, 444 U.S. 672 (1980), the Court held that faculty members were functionally part of a university's management for purposes of collective bargaining under the labor laws. The Court rejected the NLRB's effort to treat "the professional interests of the faculty and the interests of the institution" as "distinct, separable entities," finding instead that "the faculty's professional interests—as applied to governance at a university like Yeshiva—cannot be separated from those of the institution." *Id.* at 688.

economic interest.[19] In such cases, two factors are almost always present: first, the decision-makers on the medical staff are direct competitors of the plaintiff physician, and second, the medical staff has the power directly to effect the exclusion.

Neither factor is present here. To the contrary, the defendant doctors involved in the peer review proceedings included an oncologist, an orthopaedic surgeon, an anesthesiologist, a proctologist and an internist. Dr. Bolt was a general and vascular surgeon. In today's world, no one sees an oncologist or a proctologist if he or she wants general or vascular surgery; the specialties of Dr. Bolt's reviewers simply do not compete with his own.

Furthermore, under Florida law and the bylaws of the petitioner hospital, the medical staff's role is to review membership applications and to make recommendations to the governing board of the hospital.[20] The fact that staff membership is ultimately at the Board's discretion is clearly reflected in the Board's bylaws:

> The Board of Commissioners shall *consider recommendations* of the Executive Committee of the Medical Staff and shall appoint to the Medical Staff physicians and dentists who meet the qualifi-

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[19] *See, e.g.*, St. Joseph's Hospital, Inc. v. Hospital Corp. of America, 795 F.2d 948 (11th Cir. 1986); Smith v. Underwood Memorial Hospital, 1987-1 Trade Cas. (CCH) ¶ 67,538 (D.N.J. 1987); Quinn v. Kent General Hosp., Inc., 617 F. Supp. 1226, 1242 (D. Del. 1985).

[20] Fla. Stat. § 395.0653(2) (1979). *See also* the Principles of Participation in the Federal Health Insurance Program for the Aged (Medicare), Florida Stat. § 395.065(1) (1979); 42 C.F.R. § 482.12(a)(2), (5) (1989).

> cations for membership *as determined by the Board.*[21]

Dr. Bolt did not allege in his complaint that the Board was pressured by the staff to depart in any way from their mission as trustees. He merely asserted in his brief to the court below that "the evidence indicates that the governing board defers to the recommendations of the Executive Committee with respect to medical staffing decisions." Brief for Appellant at 9. This assertion amounts to little more than the observation that the medical staff is comprised of physicians and the board of laymen. This is the desired result, where the Executive Committee makes its recommendations on medical grounds, and does not contradict the Board's power to ignore such a recommendation.

III. Conclusion

This case presents issues of great importance to the AHA's membership, and more broadly to all businesses that operate with a combination of independent agents and employees. The lower court's failure properly to analyze the economic relationship between a hospital and its medical staff, in the context of credentialing, led it to misapply this Court's decision in *Copperweld*. The Court in *Copperweld* emphasized that:

> a rule that punished coordinated conduct simply because a corporation delegated certain responsibilities to autonomous units might well discourage the corporation from creating divisions with their presumed benefits. This would serve no useful antitrust purpose but could well deprive consumers of the efficiencies that decentralized management may bring. *Copperweld*, 467 U.S. at 771.

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[21] Article VII of the Bylaws of Halifax Hospital Medical Center, *cited in* Petition for Writ of Certiorari, App. at 38a, n.3.

If the lower court's decision stands, hospitals will be deterred from consulting with their medical staff on credentialing decisions by the spectre of a never-ending series of antitrust suits. The AHA respectfully urges this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

DIANE P. WOOD
1111 East 60th Street
Chicago, Illinois 60637
(312) 702-3470

JEFFREY M. TESKE
TRACEY L. FLETCHER
American Hospital Association
840 North Lake Shore Drive
Chicago, Illinois 60611
(312) 280-6700

HENRY S. ALLEN, JR.
(Counsel of Record)
McBRIDE, BAKER & COLES
Northwestern Atrium Center
500 West Madison Street
40th Floor
Chicago, Illinois 60606
(312) 715-5729

April 11, 1990